No. SC85443

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

CARMAN L. DECK,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
TWENTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE GARY P. KRAMER, JUDGE

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from two death sentences imposed on Appellant as a result of his previous convictions on two counts of first-degree murder (§ 565.020, RSMo 2000). Appellant's murder convictions and two previous death sentences were affirmed by this Court in *State v. Deck*, 994 S.W.2d 527 (1999), *cert. denied*, 528 U.S. 1009 (1999). On appeal from the circuit court's judgment overruling his Rule 29.15 motion, however, this Court reversed the death sentences, but affirmed the finding of guilt for the murder charges as well as Appellant's convictions for robbery, burglary, and armed criminal action arising out of this incident. *See Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). The death sentences involved in the current appeal were imposed after a new penalty-penalty phase trial was conducted. Because Appellant was sentenced to death, this Court has exclusive appellate jurisdiction over this appeal. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

Appellant was charged in Jefferson County Circuit Court with two counts of murder in the first degree (§ 565.020.1, RSMo 2000), two counts of armed criminal action (§ 571.015, RSMo 2000), one count of robbery in the first degree (§ 569.020, RSMo 2000), and one count of burglary in the first degree (§ 569.160, RSMo 2000), for the robbery and shooting deaths of James and Zelma Long in their rural Jefferson County home. (L.F. 61-63; 1st L.F. 56-58).[1] Appellant was also charged as a persistent offender (1st L.F. 57-58). In February 1998, Judge Gary P. Kramer presided over a trial in which the jury found Appellant guilty on all charges (L.F. 67-72; 1st L.F. 29). Appellant was given two death sentences for the murder convictions, in accordance with the jury's recommendation, and two concurrent sentences of life imprisonment for the armed criminal action convictions, thirty years for the robbery conviction, and fifteen years for the burglary conviction (L.F. 67-70; 1st L.F. 28-29, 287-93; 1st Tr. 1073-75). The sentences for the armed criminal action, robbery, and burglary convictions were ordered to be served

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[1] "L.F." (Legal File) and "Tr." (Transcript) refer to the legal file and transcript in the present appeal involving this penalty-phase retrial. "1st L.F." and "1st Tr." refer to the legal file and transcript in Appellant's first trial in which he was found guilty of the murders, a finding upheld in both Appellant's direct (No. SC80821) and post-conviction (No. SC83237) appeals to this Court. In this case, this Court has taken judicial notice of the record from Appellant's first trial.

consecutively. (L.F. 67-70; 1st L.F. 287-93; 1st Tr. 1073-75). Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

In June 1996, Appellant and his mother's boyfriend, Jim Boliek, devised a plan to obtain money that Mr. Boliek needed for a trip to Oklahoma. (1st Tr. 762; State's Ex. 69).[2] Appellant planned to steal the money from James and Zelma Long, because while living in De Soto, Missouri, some thirteen years earlier he had went to the Longs' house with their grandson, who stole money from his grandparent's safe. (Tr. 353-56; 1st Tr. 695-699, 704, 762; State's Ex. 69).

Appellant had planned to break into the Longs' house on a Sunday, while they were at church, and take money from their safe. (1st Tr. 603, 762; State's Ex. 69). He drove to DeSoto with Mr. Boliek several times to canvass the area. (Tr. 439; 1st Tr. 762; State's Ex. 69). Appellant bragged to a woman he met during this time period that he knew some people with money and that he was prepared to do "anything it took" to take it. (1st Tr. 603-04). He urged this woman to accompany him, but when she refused Appellant told her that she was "ruining the night" (1st Tr. 604-05).

Several Sundays passed without Appellant carrying out his plan. (1st Tr. 763; State's Ex. 69). On Monday, July 8, 1996, Mr. Boliek told Appellant that he and Appellant's mother wanted to leave for Oklahoma that Friday. (1st Tr. 763; State's Ex. 69). Mr. Boliek

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[2]State's Exhibit 69 is Appellant's tape-recorded confession to police that was played to the juries in both cases. (Tr. 446-47; 1st Tr. 769-70).

then gave Appellant his .22 caliber High Standard automatic pistol. (Tr. 439; 1st Tr. 725, 763; State's Ex. 69).

That afternoon, Appellant waited for his sister, Tonia Cummings, at her St. Louis County apartment until she came home at about 6:30 p.m. (1st Tr. 763; State's Ex. 69). Appellant and his sister then drove in her car to rural Jefferson County, near DeSoto, where they parked on a back road and waited for dark. (Tr. 440; 1st Tr. 763; State's Ex. 69). At nine o'clock, they drove closer to the Longs' house and pulled into their driveway. (1st Tr. 763-64; State's Ex. 69).

Appellant and his sister knocked on the door and when Zelma Long answered, they asked for directions. (Tr. 440; 1st Tr. 764; State's Ex. 69). Mrs. Long then invited them into the house. (1st Tr. 764; State's Ex. 69).

Mrs. Long explained the directions and Mr. Long wrote them down (1st Tr. 764; State's Ex. 69). As Appellant walked toward the front door he pulled the pistol from his waistband, turned and pointed the gun at the Longs, and ordered them to go lie face down on their bed. (Tr. 441; 1st Tr. 764; State's Ex. 69). They complied without a struggle and pleaded with Appellant not to hurt them. (Tr. 441; 1st Tr. 764; State's Ex. 69).

Appellant told Mr. Long to open the safe, but Mr. Long told him that he did not know the combination. (1st Tr. 765; State's Ex. 69). Mrs. Long knew the combination and opened the safe for Appellant. (Tr. 441; 1st Tr. 765; State's Ex. 69). Ms. Long took papers and jewelry out of the safe. (1st Tr. 563, 596, 765; State's Exhibits 23-25, 69). Mrs. Long also told Appellant that she had two hundred dollars in her purse which was in the kitchen. (Tr.

441-42; 1st Tr. 765; State's Ex. 69). Appellant sent Mrs. Long into the kitchen and she brought the money back to him (Tr. 441-42; 1st Tr. 765; State's Exhibits 2, 4, 5 and 69). Mr. Long told Appellant that there was about two hundred dollars in a canister on top of the television set and Appellant took that also. (1st Tr. 765; State's Ex. 69). Mr. Long also offered to write Appellant a check (1st Tr. 765). Later, Appellant, in referring to this offer, said, "That's just how nice he was." (Tr. 443; 1st Tr. 765).

Appellant ordered the Longs to lie on the bed on their stomachs with their faces to the side. (1st Tr. 765; State's Exhibits 18-20 and 69). Appellant stood at the foot of the Longs' bed for ten minutes deciding what to do with them. (Tr. 442; 1st Tr. 765-66; State's Ex. 69). Appellant was convinced that the Longs had recognized him. (Tr. 442). He later said that at the time he thought, "If I leave 'em, I'm fucked. If I shoot 'em, I'm fucked." (Tr. 443; 1st Tr. 766). As he stood there, the Longs begged him to take anything he wanted and said to him "just don't hurt us." (State's Ex. 69).

Appellant's sister, who had been watching at the front door, came down the hallway and called, "Let's get out of here." (1st Tr. 765; State's Ex. 69). She then ran out the door to the car. (State's Ex. 69).

Appellant put the gun to James Long's head and fired twice into Mr. Long's temple, above his ear and just behind his forehead (Tr. 364; 1st Tr. 708-09, 766; State's Exhibits 27-29, and 69). Both wounds were contact wounds, meaning that the gun muzzle was touching his head when Appellant shot him. (Tr. 364). A piece of James Long's glasses was driven into the wound by one of the bullets. (Tr. 365).

Appellant then either reached across or walked around the bed and put the gun to Zelma Long's head. (Tr. 366; 1st Tr. 714, 766; State's Ex. 69). He shot her twice–once in the back of the head and once above the ear. (Tr. 366; 1st Tr. 714, 766; State's Exhibits 31 and 32). Both of her wounds were also contact wounds. (Tr. 367).

Appellant grabbed the money and left. (1st Tr. 766; State's Ex. 69). On the drive back, Appellant's sister complained of stomach pains and Appellant dropped her off at a hospital. (Tr. 443; 1st Tr. 766; State's Ex. 69). Appellant gave his sister about two hundred fifty dollars of the Longs' money, kept the quarters in a decorative tin he took from the Longs, and drove back to her apartment in St. Louis County. (Tr. 443; 1st Tr. 766; State's Ex. 69).

Based on information the Jefferson County Sheriff's Office received earlier that day, St. Louis County Police were asked to assist in locating Appellant and his sister. (Tr. 281, 289; 1st Tr. 554-55, 565). The sheriff's office also began a house-to-house search in rural Jefferson County in an effort to either thwart the crimes or find the crime scene. (Tr. 284-85; 309).

Appellant was arrested in the parking lot of his sister's apartment complex (Tr. 303; 1st Tr. 566). Inside the car police found the .22 caliber gun, later determined to be the murder weapon, and the decorative tin filled with quarters. (Tr. 300, 304, 337-38; 1st Tr. 572-573, 653-654, 664, 720, 722, 727, 732; State's Exhibits 59 and 60). He was also wearing a "fanny pack" containing two hundred forty-two dollars in cash. (Tr. 302, 351; 1st Tr. 571, 578, 673-74).

Appellant was read his rights and agreed to speak with detectives from the Jefferson County Sheriff's Department. (Tr. 429-30; 1st Tr. 743-745). At first, Appellant admitted that he and his sister had been in Jefferson County looking for cars to buy. (Tr. 431; 1st Tr. 748). Four hours later, Appellant changed his story said that his mother's boyfriend, Jim Boliek, asked Appellant and his sister to follow him to DeSoto. (Tr. 432-33; 1st Tr. 752). Appellant said he parked on a back road and about fifteen minutes later Mr. Boliek returned and handed him the .22 caliber pistol and the canister full of coins through the car window. (Tr. 433; 1st Tr. 753). After being informed that Mr. Boliek had an alibi, Appellant finally confessed to the murders and made a tape-recorded statement. (Tr. 435-36, 438-43; 1st Tr. 761-66, 769; State's Ex. 69).

Appellant did not testify at either the first trial or the retrial of the penalty phase (Tr. 533-34; 1st Tr. 792, 798).

At the penalty phase retrial, the State presented several witnesses and exhibits from the guilt-phase of the first trial to acquaint the jurors with the nature of the murders Appellant committed. In addition, three of the Longs' children testified about the impact the murders had on them and their family. (Tr. 387-99, 410-21). Finally, the State presented evidence of Appellant's numerous prior convictions from 1985 until 1992. (Tr. 402-06; State's Ex. 73-78, and 80). Appellant offered the testimony of several family members, a former foster parent, and a child psychiatrist concerning his difficult childhood. (Tr. 454-532).

The jury found all six statutory aggravating circumstances presented to it on both counts of first-degree murder: (1) that the murders were each committed while Appellant was engaged in the commission of another unlawful homicide; (2) that Appellant murdered each victim for the purpose of receiving money or any other thing of monetary value; (3) that both murders involved depravity of mind; (4) that each murder was committed for the purpose of avoiding a lawful arrest; (5) that each murder was committed while Appellant was engaged in the perpetration of burglary; and (6) that each murder was committed while Appellant was engaged in the perpetration of robbery (L.F. 216-17, 222-23, 231, 234). The jury declared that the punishment for the murder of James Long should be death, and that the punishment for the murder of Zelma Long should also be death. (L.F. 231, 234). After overruling Appellant's motion for new trial, the trial court imposed two death sentences on Appellant. (Tr. 565, 570-71; L.F. 257-58).

ARGUMENT

I.

The trial court did not abuse its discretion in overruling Appellant's hearsay objection to a deputy sheriff's testimony that she received information about a "robbery and possible murder" in rural Jefferson County because this testimony was not hearsay and was properly admitted into evidence in that it was not offered to prove the truth of the matter asserted but only to explain why the police conducted a house-to-house search that eventually led to the discovery of the crime scene and why they searched for and later approached Appellant.

Appellant contends that the trial court erred in admitting the testimony of a deputy sheriff who testified that she received information about a "robbery and possible murder" that was to occur in rural Jefferson County.

But this testimony was not inadmissible hearsay because it was not offered to prove the truth of the matters asserted; instead, it was offered to explain why police subsequently conducted a house-to-house search in Jefferson County and why they approached and arrested Appellant. Moreover, contrary to Appellant's claim, this testimony did not tend to prove that Appellant planned the murders before the robbery. In addition, this testimony was cumulative to other similar testimony that was admitted without objection and its admission was neither "outcome-determinative," nor did it deprive Appellant of a fair trial.

A. Standard of review

The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997), *cert. denied*, 522 U.S. 1129 (1998). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998), *cert. denied*, 525 U.S. 896 (1998).

B. The deputy's testimony.

During trial, testimony was offered to explain to jurors why the police went to Appellant's sister's apartment in St. Louis County to look for Appellant and his sister, as well as to explain why the Jefferson County Sheriff's Department began a house-to-house search in rural De Soto, Missouri, eventually leading to the discovery of the crime scene. Jefferson County Deputy Sheriff Donna Thomas testified that she was informed by another police agency that a man named Charles Hill had information that Jefferson County would be interested in:

Q. Did you contact Charles Hill

A. Contacted him by telephone, yes.

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Based on that conversation did you have the Sheriff's Department take some subsequent action?

A. Yes.

Q. In a nutshell, basics, what information did he give you?

A. He had given me information that a robbery and possible murder–

[Appellant's Counsel]: Judge, I'm gonna object to the hearsay.

The Court: Overruled.

A. –that a robbery and possible murder was going to occur in rural De Soto with an elderly gentleman.

Q. Did you have any idea as to the location of this possible crime?

A. None whatsoever.

(Tr. 281). The deputy also testified that Mr. Hill had received this information from a former girlfriend and that the two individuals possibly involved were Appellant and his sister, Tonia Cummings.[3] Testimony from other officers showed that police waited at Tonia Cummings's apartment, where Appellant was apprehended, and that during a house-to-house search in rural Jefferson County precipitated by Mr. Hill's information, the bodies of the victims, James and Zelma Long, were discovered. (Tr. 284-85, 289-91, 300, 303, 309-10, 317).[4]

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[3]In its opinion on Appellant's first direct appeal, this Court noted that "Charles Hill . . . was a retired Marine sergeant and a former boyfriend of Tonia Cummings, who overheard Deck and Cumming's plan for the robbery/murder about a week before it was carried out. Hill did not, however, testify at the suppression hearing or at trial." *Deck*, 994 S.W.2d at 536 n.1. Charles Hill did not testify in this case either.

[4]Based on information developed during an interview with Appellant after his arrest,

C. The Testimony Was Offered For A Non-Hearsay Purpose

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *State v. Barnett*, 980 S.W.2d 297, 306 (Mo. banc 1988), *cert. denied*, 525 U.S. 1161 (1999). Although hearsay statements are generally inadmissible, an out-of-court statement not offered for the truth of the matter asserted, but in explanation of conduct, is not inadmissible hearsay. *State v. Baker*, 23 S.W.3d 702, 715 (Mo. App. E.D. 2000). Out-of-court statements that explain subsequent police conduct are admissible as supplying relevant background and continuity. *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991), *cert. denied*, 503 U.S. 992 (1992). In fact, if the out-of court statement is offered to provide relevant background to the testimony, as opposed to the truth of the matter asserted, it is not hearsay and is admissible. *State v. Jones*, 863 S.W.2d 353, 357 (Mo. App. W.D. 1993). Courts have held that admission of such testimony "is more likely to serve the ends of justice in that the jury is not called upon to speculate on the cause or the reasons for the officer's subsequent activities." *State v. Gee*, 822 S.W.2d 892, 895 (Mo. App. E.D. 1991); *see also State v. Brooks*, 618 S.W.2d 22, 25 (Mo. banc 1981).

Appellant contends that the trial court erred because no hearsay exceptions exist to admit the deputy's testimony into evidence. Appellant proceeds on the assumption that the testimony was offered to prove the truth of the matter asserted and makes a considerable effort to disprove the existence of any hearsay exceptions that would justify its admission.

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the officers conducting the search were directed to the Longs' residence. (Tr. 436-37).

Appellant's argument, however, misses the mark. The testimony was not offered to prove the truth of the matter asserted, it was offered only to show why police went looking for Appellant and his sister and why they engaged in a house-to-house search that led to the discovery of the crime scene. The deputy's testimony was offered solely for background and context, and it explained the subsequent actions by police in waiting for Appellant at his sister's apartment and in conducting a rather remarkable and frantic house-to-house search in an effort to prevent these crimes.

The officer's testimony–that she received information about a robbery and possible murder–did not on its face assert some fact which the prosecutor was offering for the truth of the matter asserted. The officer can, of course, testify that this information was given to her and describe the actions she took in response to hearing it without violating the hearsay rule. But Appellant suggests that the testimony was offered to allow the jury to engage in a form of inference stacking to arrive at a fact not asserted in the statement. Namely, that Appellant planned to kill the victims before he ever entered their house.

Appellant's highly speculative argument offers an insufficient basis for finding that the trial court abused its discretion in allowing the testimony to be admitted for the non-hearsay purpose of explaining subsequent police action. First, the jury would have had to ignore the use of the word "possible" and infer that the murders were contemplated before the robbery actually began. On top of that inference, the jury would have had to infer that Appellant himself, not anyone else, contemplated the murders. Finally, that inference would need to be stacked on yet another inference that Appellant planned to commit the

murders before the night in question. This is surely a long way to travel in an effort to convict the trial court of error.

The hearsay cases on which Appellant relies to support his argument don't apply because they involve the admission into evidence of an accomplice's confession for the express purpose of proving the truth of the matters asserted in that confession. *See Bruton v. United States*, 391 U.S. 123 (1968) (admission of a co-defendant's confession incriminating the accused at a joint trial in which the co-defendant doesn't testify); *Lilly v. Virginia*, 527 U.S. 116 (1999) (admission of an accomplice's confession inculpating the accused when the accomplice doesn't testify).[5] Here, the officer's testimony does not even suggest that a statement, much less a confession, was made by Appellant's accomplice–his sister. It's simply not possible for the deputy's testimony to be offered for the express hearsay purpose of proving the truth of the matter asserted.

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[5]The Supreme Court's recent decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), is also of no assistance to Appellant. In *Crawford*, the prosecution offered into evidence a tape-recorded statement of the accused's wife, who did not testify at trial. *Id.* at 1356-57. This statement, obtained during a police interrogation, was offered to prove the truth of the matters asserted in it so that the State could prove charges of assault and attempted murder against the accused and to disprove the accused's self-defense claim. *Id.* at 1357-58.

Appellant contends that the prosecutor's closing argument shows that the testimony was used for a hearsay purpose and not just to explain subsequent police conduct. But the prosecutor did not rely on the officer's statement to prove that Appellant planned the killings in advance, but only used it to remind the jury that Appellant didn't know that the police were looking for him when he made the decision to kill after robbing the victims. The thrust of the prosecutor's argument was that Appellant decided to kill the victims only after the robbery was complete as part of an effort to eliminate them as witnesses and to avoid the risk of being caught and returned to prison for essentially the rest of his life:

> So he's thinking, hey, they know, they've seen me, they can identify me. Now if I don't kill'em I'm guilty of robbery, I'm guilty of felonious restraint, I'm guilty of unlawful use of a weapon, I'm guilty of burglary, I'm guilty of felony stealing. With my record I'm gonna go to prison maybe for the rest of my life. You can infer that. But I kill them and they can't identify me, who's gonna know. He didn't know his sister had spilled her guts already to her boyfriend.
>
> [Appellant's Counsel]: Objection, Your Honor. Stating facts not in evidence.
>
> The Court: Overruled.
>
> [The Prosecutor]: He had no idea that the police were already looking. So he's thinking, well, if I don't kill'em I might get caught, but if I do kill'em I might not get caught. So what do I do. He shoots them so they can't identify him.

(Tr. 548). Arguably, reminding the jury that Appellant did not know that the police were looking for him worked in Appellant's favor since it didn't contradict Appellant's argument that he agonized for ten minutes over his decision to murder the victims. (Tr. 557).

In fact, the prosecutor never used the deputy's testimony for the hearsay purpose of showing that Appellant planned to kill the victims before the robbery. Instead, the prosecutor repeatedly argued the same facts that Appellant did: That Appellant stood over the victims for ten minutes before deciding to kill them. (Tr. 546-49). The prosecutor, of course, argued that these facts showed the brutality of the crime in that Appellant stood there while victims begged for their lives, while Appellant argued that these facts showed less culpability because Appellant had no plans to kill the victims until he became scared and nervous in the ten minutes before he shot them. (Tr. 557).

Consequently, Appellant's reliance on *Moore v. United States*, 429 U.S. 20 (1976), is misplaced. In that case, the accused was found guilty of drug possession on the strength of police testimony that a confidential informant, who did not testify, had stated to police that the apartment where the drugs were found belonged to the accused. *Id.* at 20-21. Here, nothing in the record shows that the prosecutor used the deputy's testimony to prove that Appellant planned the murders before committing the robbery. The only evidence the prosecutor mentioned that might arguably show that Appellant contemplated the killings

before the robbery was the simple fact that Appellant brought a gun with him that night.[6] (Tr. 560). Appellant did not object to this argument.

D. The testimony was not improperly used.

Appellant relies on several Missouri cases to support his argument that the deputy's testimony was not used simply to show subsequent police conduct, but was used for an improper hearsay purpose. But those cases are distinguishable. Those cases, and others discussed below, teach that admission of testimony offered for the non-hearsay purpose of explaining subsequent police action may nevertheless constitute reversible error when the (1) State's case is weak and the testimony on its face asserts a critical fact the State needs to prove its case; and, (2) the record shows that the prosecutor used, or the jury considered, that testimony for a hearsay purpose.

In *State v. Kirkland*, 471 S.W.2d 191 (Mo. 1971), the defendant was convicted of robbing a cab driver. At trial, a police officer testified that a person who did not testify at trial told him over the phone that the defendant had been in the cab. *Id.* at 192-93. Although the trial court gave a limiting instruction, the appellate court held that the officer's testimony was inadmissible hearsay because identification of the defendant as the robber was the central issue at trial. *Id.* at 194-95. Since *Kirkland* was decided, however,

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[6]The prosecutor could have also asked the jury to infer a plan to kill based on Appellant's admission that he cased the Longs' house for several weeks before committing the robbery. (Tr. 440).

the courts have limited its application to situations in which the disputed testimony was the only evidence to prove a required element of the State's case. *Brooks*, 618 S.W.2d at 26 ("*Kirkland* has been distinguished as a case 'in which the hearsay testimony was relied on heavily by the state to identify the defendant as the person who committed the crime and in which there was very little, if any, other evidence that connected the defendants . . . with the offense with which they were charged.'"); *State v. Matheson*, 919 S.W.2d 553, 557 (Mo. App. W.D. 1996) ("[*Kirkland*] has been strictly limited to situations in which the disputed testimony was central to the State's case."); *Gee*, 822 S.W.2d at 895 ("*Kirkland* has been limited to situations where the hearsay testimony was relied on heavily by the state to prove one of the essential elements of the crime.").

In *State v. Robinson*, 111 S.W.3d 510 (Mo. App. S.D. 2003), the defendant was convicted of trafficking and drug possession. During trial, an officer was permitted to testify, over a hearsay objection, that an unidentified confidential informant had told him that the defendant "was keeping approximately 14 pounds of marijuana and anywhere from six to nine ounces of crack cocaine" at his girlfriend's house, where police later found the drugs. *Id.* at 512-13. Although the prosecutor offered the testimony for the non-hearsay purpose of explaining subsequent police action, he nevertheless repeated this testimony during closing argument. *Id.* at 513. Compounding the problem was that during the jury's deliberations it asked the court what the "informant" had said. *Id.* The court relied on these factors in reversing the judgment and in holding that the informant's statement–that the defendant was keeping drugs at his girlfriend's house–"went beyond the scope necessary to

show subsequent conduct of law enforcement *and* was prejudicial." *Id.* at 514-15. But the court suggested that it would not have been error for the officer to testify that he went to the house because he had been informed that drugs were present there. *Id.* at 514.

In *State v. Shigemura*, 680 S.W.2d 256 (Mo. App. E.D. 1984), the defendant was charged with receiving stolen property. *Id.* at 257. The defendant objected to a police officer's testimony that a confidential informant had told him that the defendant was in possession of stolen property. *Id.* The appellate court ruled that the trial court committed prejudicial error because the sole issue in the case was the knowledge element of the crime of receiving stolen property, the evidence of knowledge was not overwhelming, and the only other evidence of knowledge was the officer's testimony concerning what the informant told him. *Id.*

In *State v. Reynolds*, 723 S.W.2d 400 (Mo. App. W.D. 1986), the defendant was convicted of promoting gambling. *Id.* at 401. The defendant objected on hearsay grounds to a police officer's testimony that before a search warrant for the defendant's restaurant had been issued, the officer received two calls from unidentified individuals regarding gambling at that restaurant and that the callers had stated that their husbands had lost money gambling at the defendant's restaurant. *Id.* at 403. The trial court permitted the testimony to explain subsequent police conduct and instructed the jury to consider it only for that purpose. *Id.* The court of appeals nevertheless reversed because the testimony about the content of the phone calls directly proved that the defendant was guilty of the charged crime, promoting gambling. *Id.* at 402-03.

Appellant also relies on a recent Southern District opinion in *State v. Garrett*, No. SD25108, 2003 WL 22228575 (Mo. App. S.D. Sept. 29, 2003), a case that has since been transferred to this Court. In *Garrett*, the defendant was convicted of two counts of drug possession with intent to distribute. *Id.* at *1. A police officer testified, over a hearsay objection, that a confidential informant had told him that the defendant was dealing drugs from a particular address, later identified as the defendant's girlfriend's house. *Id.* at *2. The prosecutor told the court that the testimony was being offered to explain subsequent police conduct, but the Southern District held that the testimony was inadmissible hearsay. *Id.* at *4. In reversing the judgment in what it described as a "close case," the court relied on the prosecutor's closing argument in which he urged the jury to use this testimony to "connect some more dots" concerning the defendant's knowledge and participation in the drug activity taking place at his girlfriend's house. *Id.* at *4, *6. In addition, the court also noted that the testimony involved a "critical issue of fact for the jury," i.e., whether Appellant possessed the drugs found at his girlfriend's house. *Id.* at *5.[7]

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[7]In another recent case, also not yet final, the court in *State v. Douglas*, No. WD61815, 2004 WL 419792, (Mo. App. W.D. Mar. 9, 2004), reversed the defendant's DWI conviction for improper admission of hearsay testimony. *Id.* at *2. To explain subsequent police conduct leading to the defendant's arrest, one of the arresting officer's testified that he had received a dispatch report about "a party slumped over the wheel" of an SUV at the same location where the defendant was eventually found intoxicated and sitting

The Missouri cases involving testimony to explain subsequent conduct by police establish that such testimony is admissible unless it is improperly relied on for a hearsay purpose. This can be shown when the prosecutor or the jury relies on the testimony for a hearsay purpose, or when the testimony asserts facts that directly prove a critical issue in the case. To the extent that this represents the law in Missouri, neither of these factors are present in this case.

Assuming that the deputy's testimony actually asserts a fact from which the jurors could infer that Appellant planned the murders before the robbery, nothing in the record shows that either the prosecutor or the jury relied on this testimony for a hearsay purpose.

Contrary to Appellant's argument, the prosecutor never argued to the jury that it should consider the deputy's testimony to prove that Appellant planned the murders before going to the victims' house. Instead, the prosecutor based his argument on the assumption that Appellant did not decide to kill the victims until ten minutes before shooting them. Similarly, nothing in the record shows that the jury relied on this testimony for an improper purpose. In fact, the jury's request, immediately before rendering its verdict, to listen to

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behind the wheel of his Ford Bronco. *Id.* at *2. Although the prosecutor did not rely on this testimony during closing argument, the jury sent a note during its deliberations requesting to see the dispatch report, which had never been admitted into evidence. In reversing the conviction, the court relied on the jury note to conclude that the jury had improperly relied on the officer's testimony regarding the dispatch. *Id.* at *6.

Appellant's recorded confession (State's Ex. 69), in which Appellant asserted that he only decided to kill the Longs during the ten minutes before shooting them, suggests exactly the opposite. Simply because the jury accepted the prosecutor's argument that Appellant's conduct, as Appellant himself described it, merited the death sentence and rejected Appellant's argument that he deserved no more than a life sentence, does not prove that the jury relied on the deputy's brief comment for an improper purpose.

Again, this testimony was offered simply to explain why police searched for and subsequently approached Appellant and why they began a house-to-house search that eventually led to the discovery of the crime scene. Without this brief explanation, the jury undoubtedly would have distracted its attention away from the trial and speculated about what kind of information would have prompted such an extreme response by police. Also, the jury may have speculated and reached conclusions about the content of that information that was either outside the record or unsupported by the evidence.[8]

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[8]The Supplemental Legal File Appellant has filed in this case contains a pre-trial deposition of Charles Hill, the man who contacted police with information about the crime. (Supp. P.L.F. 19-118). Mr. Hill did not testify in either this or the original trial, and the jury in this case was never informed of the contents of this deposition (which Appellant's counsel attended), during which Mr. Hill repeatedly testified that Appellant's sister (Tonia Cummings) had told him that Appellant had said that he would kill the Longs if they were home. (Supp. L.F. 53, 58, 60).

E. Appellant Suffered No Prejudice

Even if hearsay evidence is improperly admitted at trial, the conviction will not be reversed unless the defendant shows "that he suffered undue prejudice as a result of the error." *State v. Haddock*, 24 S.W.3d 192, 196 (Mo. App. W.D. 2000). "Any error in admitting evidence is not considered prejudicial when similar evidence is properly admitted elsewhere in the case or has otherwise come into evidence without objection." *State v. Crump*, 986 S.W.2d 180, 188 (Mo. App. E.D. 1999). "Generally, a party cannot complain about the admission of testimony over his objection, where evidence of the same tenor is admitted without objection." *State v. Sloan*, 998 S.W.2d 142, 145 (Mo. App. E.D. 1999), *quoting State v. Griffin*, 876 S.W.2d 43, 45 (Mo. App. E.D. 1994).

Even if a constitutional violation is alleged, an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. *See State v. Duncan*, 945 S.W.2d 643, 649 (Mo. App. S.D. 1997); *Chapman v. California*, 386 U.S. 18, 24 (1967). In determining whether error is harmless, this Court should consider the circumstances of the error and the quality of the evidence in support of the verdict. *State v. Samuels*, 965 S.W.2d 913, 920 (Mo. App. W.D. 1998). Where challenged evidence is merely cumulative, any error in its admission is harmless beyond a reasonable doubt. *State v. Debler*, 856 S.W.2d 641, 649 (Mo. banc 1993); *Duncan*, 945 S.W.2d at 649.

In this case, two other police officers gave testimony, to which Appellant offered no objection, substantially similar to the deputy's testimony about which Appellant complains.

In explaining why he went to Appellant's sister's apartment and waited for Appellant and his sister to return, a St. Louis County officer testified that he was directed to go to the apartment "to locate a vehicle and a subject that was possibly involved in a homicide." (Tr. 289). Appellant did not object to this testimony or move to have it stricken from the record. This officer later testified, again without objection, that his search of Appellant's car occurred after he had been given "information that [Appellant] was possibly involved in a crime." (Tr. 300). A Jefferson County Sheriff's deputy–not the one whose testimony Appellant is challenging–testified, without objection, that a house-to-house search had commenced in Jefferson County because the sheriff's office had received information about "a possible home invasion." (Tr. 310).

In determining whether the improper admission of evidence is harmless error, the Missouri Supreme Court employs the "outcome-determinative" test. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000); *State v. Black*, 50 S.W.3d 778, 786 (Mo. banc 2001), *cert. denied*, 534 U.S. 1153 (2002). Improperly admitted evidence is outcome-determinative when it has "an effect on the jury's deliberations to the point that it contributed to the result reached." *Barriner*, 34 S.W.3d at 151. In other words, a finding of outcome-determinative prejudice occurs when "the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence." *State v. Black*, 50 S.W.3d at 786; *see also State v. Barriner*, 34 S.W.3d at 150.

The admission of the deputy's testimony was not outcome-determinative. Appellant has failed to make any showing that the jury relied on this information in reaching its verdict. The arguments the jury heard from both sides focused on Appellant's actions during the ten minutes he contemplated killing the Longs, and nothing indicates that their verdict was based on any belief that Appellant planned the killings before he arrived. The jury's review of Appellant's confession immediately before reaching their verdict shows that they based their verdict on Appellant's actions at the Longs' house, not on whether he planned to kill them before the robbery occurred. Moreover, the fact that Appellant made the Longs beg for their lives for ten minutes before killing them was a sufficient basis alone to justify the death sentences. Consequently, to the extent that the admission of the officer's testimony on direct examination was error, it was harmless.

II.

The trial court did not abuse its discretion in overruling Appellant's objection to his being restrained during the retrial of his penalty phase because the use of restraints per se does not violate the Constitution; the record shows that legitimate security concerns justified the use of restraints; and the record does not demonstrate that Appellant was prejudiced by the use of restraints in this case.

Appellant contends the trial court abused its discretion in having him restrained during this penalty phase retrial. But the law permitted the trial court to use restraints and Appellant has failed to demonstrate that their use was prejudicial.

A. The use of restraints at Appellant's trial.

Before the retrial of Appellant's penalty phase, the trial court ordered that Appellant be allowed "to dress in court clothes for trial." (L.F. 48). Appellant later filed a motion to appear at trial free from restraints and shackles, which the trial court overruled. (L.F. 49, 183-94). During voir dire, but outside the presence of the jury, Appellant objected to wearing shackles:

> [Appellant's Counsel]: . . . I just wanted to make a record that [Appellant] is actually in leg-irons and handchains and the defense objects to that. We think that it is unduly–it prejudices him towards the jury and it makes him look dangerous.
>
> The Court: The objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain.

(Tr. 74). During voir dire, Appellant's counsel asked the jury panel whether anyone would be affected by Appellant's shackles; no one responded that it would have any affect:

> The other thing about [Appellant] that you all either do or will know is that there's chains on him. I guess that's what happens when you get convicted, but I don't want anybody to think anything or to make it more likely that you're gonna render one sentence or another. Is that gonna affect anyone in any way? Let me ask it this way. Everybody over here, can you guarantee me the fact that–I mean he's shackled, his hands, it's not gonna affect you one way or another in the ultimate verdict? Can I see a sign of hands that everybody would agree that it's not gonna affect them whatsoever, yes, it's not going to? Over here, would everybody agree? Is there anyone that it would affect?

(Tr. 165). At the conclusion of voir dire, Appellant moved to strike the entire jury panel because he had worn shackles in front of them:

> [Appellant's Counsel]: . . . I would ask that or like to move to strike the entire jury panel for cause because of the fact that [Appellant] is shackled in front of the jury and makes them think that he is going to–he is violent today and gonna do something in the courtroom or do something to them and it puts fear in their minds, which is not appropriate for someone who's gonna decide the penalty in this case.
>
> The Court: On the contrary, him being shackled takes any fear out of their minds.
>
> [Appellant's Counsel]: I wouldn't agree with that.

The Court: That motion is overruled.

(Tr. 257).

B. Standard of review.

"The use of restraints for courtroom security purposes is within the discretion of the trial court." *State v. Kinder*, 942 S.W.2d 313, 330 (Mo. banc 1997), *cert. denied*, 522 U.S. 854 (1997) (defendant required to wear leg shackles during part of guilt phase in capital-murder trial); *see also State v. Amrine*, 741 S.W.2d 665, 675 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988) (defendant's legs shackled to chair during entire trial on capital murder charge). "[T]he trial judge bears the responsibility for the conduct of the trial, the safety of all persons in the courtroom, and the prevention of escape." *State v. Endicott*, 881 S.W.2d 661, 663 (Mo. App. W.D. 1994); *see also State v. Johnson*, 850 S.W.2d 401, 402 (Mo. App. W.D. 1993). "The judge has 'considerable, but not unlimited, discretion in determining the propriety of permitting physical restraints' on the defendant." *State v. Jimerson*, 820 S.W.2d 500, 503 (Mo. App. W.D. 1991).

C. Restraints and the presumption of innocence.

The idea that a criminal defendant should appear free from restraints and not be forced to wear prison clothing derives from the presumption of innocence to which each defendant is entitled:

> This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence.

Holbrook v. Flynn, 475 U.S. 560, 567 (1986). In *Holbrook*, the Court held that a robbery defendant's constitutional rights were not violated during his joint trial with five co-defendants when normal courtroom security was supplemented by four uniformed state troopers seated in the first row of the spectator's section. *Id.* at 571-72.

The Court has relied on the presumption of innocence in other cases involving security concerns:

> To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of

criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

Estelle v. Williams, 425 U.S. 501, 503 (1976). In *Estelle*, the Court held that a State cannot constitutionally compel a criminal defendant to wear prison clothes during trial, but distinguished this from the use of restraints because "[u]nlike physical restraints . . . compelling an accused to wear jail clothing furthers no essential state policy."[9] *Id.* at 505. Appellant seriously misapprehends these cases to the extent he argues that their holdings are not grounded on the presumption of innocence.[10]

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[9]In *Estelle*, the Court found no constitutional violation because nothing in the record showed that the defendant was "compelled" to wear prison clothes at trial. *Id.* at 512.

[10]Appellant also contends that *Illinois v. Allen*, 397 U.S. 337 (1970), was not grounded on the presumption of innocence. While this may be true it does nothing to advance Appellant's argument. *Allen* involved a criminal defendant's Sixth Amendment right to be present at his own trial after he was removed from the courtroom for abusive and disruptive behavior.

D. The use of restraints during the penalty phase of a capital trial.

The presumption of innocence, however, is not a concern during the penalty phase of a capital-murder trial after the defendant has been found guilty of first-degree murder. *State v. Young*, 853 P.2d 327, 350 (Utah 1993); *Duckett v. State*, 752 P.2d 752, 755 (Nev. 1988); *Bowers v. State*, 507 A.2d 1072, 1081 (Md. 1986), *cert. denied*, 479 U.S. 890 (1986). As Appellant concedes, the Supreme Court has never held that the use of restraints during the penalty phase is per se unconstitutional. In fact, it has never held that it is unconstitutional to use restraints at any criminal trial. Instead, in considering courtroom security issues, the Court has rejected an approach that presumes all security practices are inherently prejudicial and has adopted a case-by-case method in reviewing such claims. *See Holbrook*, 475 U.S. at 569.

The presumption of innocence is but a distant memory in this case, which involves the retrial of the penalty phase years after Appellant was originally found guilty of two counts of murder in 1998. Not only have these guilty verdicts been upheld after both direct and state post-conviction appeals, but the jury was constantly reminded by both sides throughout this retrial that Appellant had been found guilty of two counts of first-degree murder. (Tr. 8, 106, 111, 183-85, 188, 201, 202, 215-16, 222, 230-32, 241, 244, 246, 248, 254, 273, 274).

This case is controlled by *State v. Hall*, 982 S.W.2d 675 (Mo. banc 1999), *cert. denied*, 526 1151 (1999), in which this Court held that the trial court did not err in overruling the defendant's objection to his wearing "leg and waist shackles during the

penalty phase." *Id.* at 685; *see also State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1998), *cert. denied*, 524 U.S. 957 (1998) (trial court did not abuse its discretion in failing to declare a mistrial after the jury witnessed the defendant being handcuffed immediately after the guilt-phase verdicts were read and before the penalty phase began).

The Eighth Circuit also found no constitutional violation in considering this issue in Hall's federal appeal. *Hall v. Luebbers*, 296 F.3d 685 (CA8 2002), *cert. denied*, 538 U.S. 951 (2003). The federal court found no evidence in the record either that the jurors ever saw the leg and waist shackles or that the shackles hindered the defendant's ability to participate in the proceedings. *Id.* at 698-99. The court also rejected the argument (also advanced by Appellant in this case) that the use of the shackles during the penalty phase improperly affected the jury's sentencing decision:

> We do not find persuasive any contention that the use of shackles during the penalty phase would necessarily lead jurors to conclude that they must impose a death sentence. These jurors had already found Hall guilty of first degree murder and could have found shackles to be a reasonable security measure.

Id. at 699 (citation omitted).[11]

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[11]The omitted citation is to *Elledge v. Dugger*, 823 F.2d 1439 (CA11 1987), *opinion withdrawn in part*, 833 F.3d 250, *cert. denied*, 485 U.S. 1014 (1988), a case on which Appellant relies. The conclusion with which the Eighth Circuit disagreed–that penalty-phase jurors seeing shackles would impose death–was relied on in *Elledge* to find a

E. The trial court did not abuse its discretion.

The trial court did not abuse its discretion in requiring Appellant to be shackled under the facts of this case. First, it's not clear from the record just how noticeable Appellant's restraints were to the jury, or how aware the jury was of the restraints until Appellant directed their attention to them during voir dire. The manner in which Appellant directed the jury panel's attention to the restraints ("either you all do or will know") suggests that the presence of the restraints was not obvious.

Appellant utterly failed to make a record at trial demonstrating the extent of the shackling and the jury's awareness of it. For example, nothing in the record shows that the jury could see the leg restraints, or even the belly chain, while Appellant was seated. The record does not reflect whether the jurors saw Appellant being led into the courtroom in restraints, or, what's more likely, whether he was already seated when jurors were brought into court. Finally, Appellant made no claim that the restraints hindered his ability to participate in the proceedings.

Second, any prejudice arguably inherent in Appellant's shackling was cured by Appellant's voir dire inquiry whether the shackling would have any effect on the individual members of the jury panel. All agreed that it would have no affect on their decision.

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constitutional violation. *Id.* at 1450.

Third, Appellant neither sought a hearing on the necessity of the restraints, nor offered an alternative to the restraints then being used. The only record Appellant made that he was prejudiced by the restraints was simply that he was shackled.

This case did not involve a penalty phase directly following a guilt-phase trial in which Appellant had not been shackled (though under *Hall* this would have been permissible), but was a retrial of a penalty phase involving a jury that had been repeatedly informed both before and during trial that Appellant had already been found guilty of a double-homicide.

Moreover, this case presents security concerns not present in other penalty phase proceedings. Appellant, who had already spent several years in prison, was aware that the guilty verdicts for both counts of first-degree murder had been upheld on both his direct and post-conviction appeals. Other convicted murderers, even those sentenced to death, can appeal hoping for a new guilt-phase trial on appeal. But the only issue that remained for Appellant was whether he would die or spend the rest of his life in prison, and he had already been sentenced to death once before for these murders.

Consequently, the threat that he would waive his right to appeal under the escape rule was little incentive for Appellant not to flee, or otherwise disrupt the trial. The trial judge, who also presided over Appellant's first trial, was aware that Appellant, a repeat offender many times over, killed the victims in this case to avoid being sent back to prison for what likely would have been the rest of his life. If Appellant would perform an execution-style murder of an elderly couple just to avoid a lengthy prison term, why wouldn't he attempt to

flee, perhaps harming others in the process, to avoid a life sentence without parole or, worse yet, death?

F. Appellant's reliance on out-of-state cases is misplaced.

The cases from other jurisdictions on which Appellant relies do not represent "the majority" with respect to the use of restraints during a capital-murder penalty phase. Most of these cases do not involve a finding that the trial court violated the Constitution by using restraints, but instead turn on the trial court's failure to follow procedural requirements before using restraints. *Duckett v. Godinez*, 67 F.3d 734, 748-50 (CA9 1995), *cert. denied*, 517 U.S. 1158 (1996) (ordering new penalty phase when the state trial court failed to make a record showing compliance with that circuit's "two-step" process before restraining a defendant); *Bello v. State*, 547 So.2d 914 (Fla. 1989) (ordering new penalty phase when the trial court failed to honor the defendant's request for an inquiry into the need for shackling); *Laird v. Horn*, 159 F. Supp.2d 58, 101-02 (E.D. Pa. 2001) (ordering new penalty phase when the state trial court failed to conduct a hearing or make findings on the record on the need for shackling); *Elledge v. Dugger*, 823 F.2d at 1451-52 (ordering a new penalty phase when the state trial court failed to conduct a hearing or make a record showing that shackling was necessary);[12] *Lovell v. State*, 702 A.2d 261, 273-74 (Md. 1997)

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[12]Appellant relies heavily on *Elledge*, but the opinion in that case concludes that a "case-by-case" approach to the issue is inconsistent with controlling precedent. 823 F.2d at 1450-51. This statement is directly contrary to the Supreme Court's holding in

(ordering a new penalty phase when the trial court failed to make an adequate record showing the need for shackling). The Supreme Court has never suggested that the Constitution requires that any particular procedure be followed before restraining a convicted murderer. The cases on which Appellant relies are not in accord with either the decision of this Court or the Eighth Circuit in *Hall*.

Holbrook, which mandated a case-by-case approach. Ironically, the Eleventh Circuit purportedly relies on *Holbrook* in reaching its judgment. *Id.* The majority opinion in *Elledge* was not even accepted by all the judges on the Eleventh Circuit as reflected by the opinion of the dissenting judge and the several judges who dissented from the court's refusal to hear the case en banc. *See Elledge v. Dugger*, 833 F.2d 250 (CA11 1987); *see also People v. Seaton*, 28 P.3d 175 (Cal. 2001), *cert. denied*, 535 U.S. 1036 (2002).

III.

The trial court did not plainly err in failing to sua sponte revise death-penalty Instructions 7 and 8 (Count I–murder of James Long) and 12 and 13 (Count III–murder of Zelma Long) to include language requiring that the determinations required by those instructions be found beyond a reasonable doubt because the MAI-CR pattern instructions on which these instructions were based does not contain this language, and neither this Court's decision in *State v. Whitfield,* nor the Constitution, requires that this language be included in those instructions.

Appellant, relying on this Court's opinion in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), contends that the trial court plainly erred in submitting penalty-phase Instructions Nos. 7 and 12 (Count I) and 8 and 13 (Count III) because those instructions did not tell the jury that the State bore the burden of proving beyond a reasonable doubt: (1) that the circumstances in aggravation of punishment, taken as a whole, warranted the death sentence (Nos. 7 and 12); and (2) that the evidence in mitigation was not sufficient to outweigh the evidence in aggravation (Nos. 8 and 13).

A. Penalty-phase instructions.

Instructions 7 and 12, patterned after MAI-CR 3d 313.41A (10-1-94), provided:

> As to Count [I or III], if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. [6 or 11] exists, then you must decide whether there are facts and

circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstance submitted in Instruction No. [6 or 11]. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 217, 223). Instructions 8 and 13, patterned after MAI-CR 3d 313.44A (10-1-94), provided:

As to Count [I or III], if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.

You shall also consider any facts or circumstances that you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 218, 224).

These penalty-phase instructions are derived from § 565.030.4, RSMo 2000, which provides in pertinent part:

The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier;

Section 565.030.4 (2) and (3).[13]

B. Standard of review.

Plain errors may be considered in the discretion of the court when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Rule 30.20. The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000). A plain error is one that "must impact so substantially upon the rights of the defendant that manifest injustice or a miscarriage of justice will result if uncorrected." *State v. Driscoll*, 711 S.W.2d 512, 515 (Mo. banc 1986), *cert. denied*, 479 U.S. 922 (1986).

"Instructional error seldom rises to the level of plain error." *State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000). For instructional error to be plain error, the defendant must show more than mere prejudice; he must "establish that the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *Wright*, 30 S.W.3d at 912.

C. Reasonable doubt language was not required in these instructions.

For appellant's argument to succeed, this Court must accept a premise which is untrue–that the jury must find the existence of the non-statutory aggravating circumstances

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[13]"In 2001, . . . the legislature eliminated step 2 as a required separate finding." *Whitfield*, 107 S.W.3d at 259 n.5; *see also* § 565.030, RSMo Supp. 2002.

beyond a reasonable doubt to find that the defendant is eligible for a death sentence. But this Court has held–even after *Whitfield*–that the existence of one statutory aggravating circumstance is sufficient to support a death sentence. *See Taylor v. State*, 126 S.W.3d 755, 763 (Mo. banc 2004); *State v. Smith*, 32 S.W.3d 532, 556 (Mo. banc 2000).

When a jury considers the facts and circumstances in aggravation of punishment that warrant death, it is not constitutionally required to find that any non-statutory aggravating circumstances exist, much less that such circumstances be found beyond a reasonable doubt. The jury can consider a defendant eligible for a death sentence by simply finding the existence of a statutory aggravating circumstance beyond a reasonable doubt and concluding that this circumstance alone warrants imposition of the death penalty. Nothing in the law requires that a jury find beyond a reasonable doubt that the aggravating circumstances of a case taken as a whole warrant imposition of a death sentence. This position is consistent with that taken by the General Assembly in 1993 when it amended § 565.030.4(2) to eliminate the requirement that step 2 be found by the trier beyond a reasonable doubt.[14] 1993 Mo. Laws 503.

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[14]Before that amendment, this subsection provided: "If the trier does not find beyond a reasonable doubt that anyone or more of the aggravating circumstances listed in subsection 2 of section 565.032, if found, together with any other authorized aggravating circumstances found, warrant imposing the death sentence; . . . ."

This Court has recognized that during penalty-phase deliberations the only determination that must be made beyond a reasonable doubt is the existence of a statutory aggravating circumstance; and it has held that a death-penalty system that does not require any further determinations to be made beyond a reasonable doubt is still constitutional. *State v. Smith*, 649 S.W.2d 417, 430 (Mo. banc 1983), *cert. denied*, 464 U.S. 908 (1983); *State v. Bolder*, 635 S.W.2d 673, 684 (Mo. banc 1982), *cert. denied*, 459 U.S. 1137 (1983), *citing Gregg v. Georgia*, 428 U.S. 153 (1976).

This follows from the reasoning stated in *Smith*, which is that determinations of whether the facts and circumstances taken as a whole warrant imposition of a death sentence and whether mitigating circumstances outweigh aggravating circumstances are not ones subject to proof of a fact certain, but are determined based on all the facts peculiar to that case. *Smith*, 649 S.W.2d at 430. The use of discretionary judgment in making this factual determination is apparent: "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no 'central issue' from which the jury's attention may be diverted. . . . In this sense, the jury's choice between life and death must be individualized." *California v. Ramos*, 463 U.S. 992, 1008 (1983).

Because of the qualitative, individualized nature of the factual determinations to be made in determining whether death is warranted in a particular case, and the constitutional requirement that no specific legal rule, beyond finding a statutory aggravating circumstance, may be applied to the jury's consideration of this issue, the Constitution

does not require that these determinations be made beyond a reasonable doubt. "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in consideration of aggravating and mitigating circumstances[.]" *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

> We have rejected the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." . . . Equally settled is the corollary that the Constitution does not require the State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.

Harris v. Alabama, 513 U.S. 504, 512 (1995) (citation omitted).

For example, in this case one of the statutory aggravating circumstances was that each murder was committed while Appellant was engaged in the commission of another unlawful homicide. In other words, the question was whether Appellant murdered more than one person while committing these crimes. This statutory aggravating circumstance, like all others (including all those specifically found by the jury in this case), can be objectively applied to the facts of every murder case in determining whether a particular defendant is eligible for the death penalty. If a particular defendant has murdered more than one person, then he is eligible for the death penalty. If he has not, then he is not eligible based on that statutory aggravating circumstance. This determination can also be made beyond a reasonable doubt. It simply involves applying the statutorily defined aggravating

circumstance, *i.e.*, murder of more than one person, to the factual circumstances of the case.

But making a determination of whether the circumstances in a case taken as whole warrant imposition of the death penalty, or whether the mitigating circumstances in a particular case outweigh the aggravating circumstances, is something entirely different. No statutory definition can be crafted to cover all the cases that might be considered. Consequently, a jury can make no finding beyond a reasonable doubt of an identifiable fact in such a case, since their determination is made by considering all the circumstances of a particular case. And all would agree that no two cases are exactly alike.

Appellant argues that *Ring v. Arizona*, 536 U.S. 584 (2002), which was spawned by the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and which requires that a jury, not a judge, determine whether a statutory aggravating circumstance is proved in capital cases, raised the burden of proof for every step (except step 4) in penalty-phase deliberations under Missouri law. But the issue in *Ring* was limited only to whether a statutory aggravating circumstance must be found by a jury instead of the judge–the Court expressly stated that it was not considering any claim regarding mitigating circumstances or whether a jury must make the ultimate decision whether to impose a death sentence. *Ring*, 536 U.S. at 597 n. 4.[15]

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[15]Any doubt about the limitation of the Court's holding in *Ring* is resolved by the concurring opinion of Justice Scalia: "What today's decision says is that the jury must find

The Court held that statutory aggravating circumstances "operate as 'the functional equivalent of an element of a greater offense'" and must therefore have been found by a jury. *Id.* at 609, *quoting Apprendi*, 530 U.S. at 494 n.19. The opinion stated that such a functional equivalent of an element "must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602, *citing Apprendi*, 530 U.S. at 482-83.

In this case, the jury instructions, verdict director, and sentence complied with *Ring*. The jury was instructed that it must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt in order to sentence appellant to death, and its verdict stated that it found the all the circumstance on which it was instructed. (L.F. 216, 220-22, 226-27, 231). Neither *Ring*, nor *Apprendi*, requires that the determination of aggravating or mitigating circumstances taken as a whole, as outlined in steps 2 and 3 of Missouri's capital sentencing scheme, be made beyond a reasonable doubt. *See People v. Danks*, 82 P.3d 1249 (Cal. 2004); *Oken v. State*, 835 A.2d 1105, 1148-52 (Md. 2003); *Torres v. State*, 58 P.3d 214, 215-16 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 928 (2003). Therefore, *Ring* and *Apprendi* provide Appellant no relief.

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the existence of the *fact* that an aggravating factor existed." *Id.* at 612 (Scalia, J., concurring) (emphasis in original). Although six Justices joined the majority opinion, two of those were Justices Scalia and Thomas, and Justice Thomas also joined Justice Scalia's concurring opinion. Without these two votes, the Court's opinion in *Ring* does not command a majority of the Court.

Appellant also contends that *Whitfield* requires that steps 2 and 3 of the sentencing scheme must be proven beyond a reasonable doubt. In *Whitfield* this Court extended to those steps the *Ring* requirement that a "jury rather than a judge determine the facts on which the death penalty is based." *Whitfield*, 107 S.W.3d at 262. While the opinion quotes language from *Ring* (which quoted *Apprendi*) about the jury having to find "beyond a reasonable doubt" the facts increasing the authorized punishment, this language was not relied upon by this Court in its holding, nor was it necessary for either the constitutional violations in *Ring* or *Whitfield* to be remedied, since in both cases judges, not juries, found all the facts necessary to impose punishment, including the existence of a statutory aggravating circumstance. *Ring*, 536 U.S. at 609; *Whitfield*, 107 S.W.3d at 261-62.

Other than this one quote, the *Whitfield* opinion does not say that steps 2 and 3 must be found beyond a reasonable doubt. Even in its analysis finding that steps 2 and 3 were "facts" requiring jury determination, this Court recognized the evaluative nature of these two steps, identifying them not as "elements" or "provable facts," but as "case-by-case factual determination[s] based on all the aggravating facts the trier of fact finds . . . present in the case" and "factual finding that are prerequisites to the trier of fact's determination" of death eligibility. *Whitfield*, 107 S.W.3d at 259, 261.

The findings in steps 2 and 3 cannot be "elements" as that word is used in *Ring* and *Apprendi* because they involve determinations based solely on the facts of the specific case under determination and by definition can have no application to any other case. Elements of an offense must be specific and identifiable, not open-ended and subjective.

To conclude that steps 2 and 3 involve elements of the crime could also implicate other constitutional concerns not anticipated, much less intended, when *Whitfield* was decided. Moreover, beyond the finding of a statutory aggravating circumstance, the Supreme Court has forbidden any effort to statutorily direct the jury's discretionary decision in imposing a death sentence.

Because *Whitfield* is limited to the issue of whether a judge or jury can make the required factual findings, and not to the burden of persuasion associated with those findings, it does not, as Appellant asserts, support his claim that a jury must make the determinations outlined in steps 2 and 3 beyond a reasonable doubt.

The *Whitfield* opinion itself reveals that its holding is limited only to the issue of whether a judge may determine whether aggravating circumstances as a whole warrant death and whether mitigating circumstances outweigh aggravating circumstances. The opinion does not require that these determinations be found beyond a reasonable doubt. In determining the effect retroactive application of the rule created in *Whitfield* would have on the administration of justice, this Court identified only five cases which would be affected by the new rule. *Whitfield*, 107 S.W.3d at 269. Had this Court's holding been as extensive as Appellant suggests, there would undoubtedly have been far more cases–perhaps every case resulting in a death sentence–that would have been affected by the holding. *Whitfield* should not be read as broadly as Appellant suggests.

Even more tellingly, in October 2003, less than four months after issuing its opinion in *Whitfield*, this Court promulgated new jury instructions pertaining to penalty-phase

deliberations in capital cases. *See* Order, In re: Revisions and withdrawals to MACH-CR and MAI-CR 3d (Mo. banc Oct. 7, 2003); MAI-CR 3d 313.48, 313.48A, 313.48B. Even under the revised instructions, the beyond a reasonable doubt standard still applies only to the finding of a statutory aggravating circumstance. The revised instructions do not require the jury to find beyond a reasonable doubt either that the facts and circumstances in aggravation of punishment taken as a whole warrant imposition of a death sentence, or that the mitigating circumstances do not outweigh aggravating circumstances. MAI-CR 3d 313.48A. This Court obviously considered *Whitfield* in revising its instructions because the penalty-phase verdict forms require the jurors to answer special interrogatories when it cannot agree on punishment so that the court can determine at what stage of deliberations the jurors deadlocked. MAI-CR 3d 313.58, 313.58A, 313.58B.

In light of this Court's approval of the revised instructions, Appellant's argument that *Whitfield* requires proof beyond a reasonable doubt of the determinations made in steps 2 and 3 misapprehends the holding of *Whitfield*, which is simply that the jury, not the court, must make the determinations required by all but the last stage of penalty-phase deliberations.

In sum, the Constitution requires only that a jury find a statutory aggravating circumstance beyond a reasonable doubt to make a defendant eligible for the death penalty. Whatever else is required under § 565.030 in addition to this constitutional requirement to make a defendant either eligible or selectable for a death sentence is not required by the

Constitution, and a jury need not make these determinations, whether they involve finding facts or exercising discretion, beyond a reasonable doubt.

IV.

The trial court did not plainly err in failing to read the short version of the recess instruction (MAI-CR 3d 300.04.2) or in refusing Appellant's request to question the sequestered jurors once the alleged failure was discovered because Appellant suffered no manifest injustice in that the long version (MAI-CR 3d 300.04.1) was read to the jury at the first recess, the short version was read to the jurors on numerous other occasions, and the trial court failed to give the recess instruction on only two occasions over a three-day trial. [16]

Appellant contends that on occasion the trial court failed to read the so-called recess instruction (short version) required by MAI-CR 3d 300.04.[17] Appellant concedes that the long version of this instruction (300.04.1) was read to the jury panel when the first

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[16]Appellant's Brief also claims that the court erred in not reading MAI-CR 3d 302.02, but in a letter later sent to this Court (reproduced in the Appendix) Appellant has now abandoned that claim.

[17]MAI-CR 3d 300.04 is reproduced in its entirety in the Appendix. This instruction was modified effective January 1, 2004, (well after this case was tried) to include an additional instruction (300.04.3) for use at recesses occurring after the first stage of a bifurcated trial: "Until you retire to consider your verdict as to punishment, you must not discuss this case among yourselves or with others, or permit anyone to discuss it in your hearing. (Do not read, view or listen to any newspaper, radio, or television report of the trial.)." MAI-CR 3d 300.04.3 (1-1-2004).

recess was taken. (Appellant's Brief, p. 92). But he contends that the trial court plainly erred by not reading the short version (300.04.2) to the panel or jury at every recess or adjournment that followed. The short version of this instruction provides:

> 2. AT SUBSEQUENT RECESSES OR ADJOURNMENTS
>
> The Court again reminds you of what you were told at the first recess of the Court. Until you retire to consider your verdict, you must not discuss this case among yourselves or with others, or permit anyone to discuss it in your hearing. You should not form or express any opinion about the case until it is finally given to you to decide.

MAI-CR 3d 300.04.2 (9-1-2002). The Notes on Use to this instruction state that MAI-CR 3d 300.04.1 (long version) should be read either at the conclusion of voir dire or, if a recess occurs during voir dire, before the first recess. MAI-CR 3d 300.04, Note on Use 2.

Although Appellant's Brief states that the long version of the instruction was read to the jury at the end of general voir dire (Tr. 140), the record actually reflects that the first recess occurred near the beginning of general voir dire when the trial court recessed the proceedings to conduct individual voir dire in chambers covering hardship and publicity issues:

> At this time what we are going to do is take a recess and ask the majority of you to be patient, but in response to those questions that I've asked thus far, some of you we will be asking to come back to chambers so that we can inquire more fully

into those issues, such as hardship and publicity, to determine whether or not you should be excused and sent home at this time.

(Panel instructed by the Court and the following proceedings had in chambers:)

(Tr. 12).[18] The trial court paid particular attention to the hardship issues because the jurors selected for trial were to be sequestered for the duration of the trial. (Tr. 2-3).

After this individual voir dire but before the noon recess, the trial court read the instruction to the remaining veniremembers who had not been excused.[19] The trial court also instructed the jury panel before conducting further individual voir dire and again after general voir dire was completed. (Tr. 140, 176). The court then conducted death-qualification voir dire in smaller panels. (Tr. 181-82). The record does not show that any recesses were taken during this time, but it does state that the panel members were "escorted back to waiting rooms [or areas]" after voir dire for their panel was completed. (Tr. 199, 215, 241).

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[18]Appellant does not dispute that the phrase "panel instructed" appearing in the transcript reflects that MAI-CR 3d 300.04 was read to the jury. In fact, Appellant concedes that the newly impaneled jury was read 300.04 at page 140 of the transcript, which simply states "Jury instructed."

[19]"(The proceedings returned to the courtroom and the remaining veniremembers instructed by the Court and the noon recess was taken.)." (Tr. 75).

At the conclusion of death-qualification voir dire the veniremembers were "given the cautionary instruction by the Court" and allowed one hour for dinner. (Tr. 255). The attorneys and trial judge remained in chambers and selected the jury. (Tr. 255-61). After the veniremembers returned, the only other activity noted in the record was the court's seating of the jury and sending the jurors home to pack a bag and return to the hotel for sequestration. (Tr. 262). The record does not show that the recess instruction was given again, and Appellant lodged no objection. (Tr. 262).

The record reflects that on the second day of trial the recess instruction was given at each recess, but it does not show that the instruction was given when the trial was adjourned for the day. (Tr. 305, 371, 422). The next morning (the final day of trial), Appellant objected to the trial court's failure to read the recess instruction at the previous day's adjournment, suggested that the instruction may not have been read at any recess, and asked for either a mistrial or an opportunity to individually question the jurors. (Tr. 425-26). The trial court overruled the motion and denied the request to question the jurors. (Tr. 426). The recess instruction was read to the jury at each recess on the final day of trial, except for one recess occurring after both parties had rested and before the instruction conference began. (Tr. 454, 478, 532-33).

A. Standard of review.

Appellant concedes that this claim of error is not preserved and is only subject to plain error review, if it is reviewed at all. In fact, Missouri courts have held that the failure to object at the moment the court fails to read the recess instruction, so that corrective action may be taken, waives any claim of error. *State v. Starke*, 811 S.W.2d 799, 801 (Mo. App. W.D. 1991); *State v. Barajas*, 930 S.W.2d 74, 75 (Mo. App. W.D. 1996); *State v. Cable*, 4 S.W.3d 571, 574 (Mo. App. S.D. 1999). To the extent that this Court considers Appellant's claim of error, the standard of review for plain error is contained under Part III herein.

B. Appellant suffered no manifest injustice.

In effect, Appellant contends that he suffered manifest injustice because the trial court failed to read to this sequestered jury the short version of the recess instruction on two occasions (the end of the second day and after both sides had rested) over a three-day trial. Appellant asserts this claim even though the trial court read the instruction (both the long version at the first recess and the short version at later recesses) on at least nine other occasions during trial.

Appellant's suggestion that the instruction was required to be read at the conclusion of each panel's death-qualification voir dire is not supported by the plain language of MAI-CR 3d 300.04 and the record. The instruction provides that it should be given at each "subsequent recesses," but the record shows that the court did not declare any recesses after concluding each panel's voir dire. In fact, the panels were examined in turn without

any recesses and the panel members that had completed that portion of voir dire were "escorted" back to the waiting area.

Appellant's argument that the court failed to read the instruction at the end of the first day of trial is similarly without merit. The court did read the instruction just before the dinner recess, during which the court and attorneys made the final jury selection. When the veniremembers returned, the only activity that took place was the seating of the jury and sending the jurors home to pack and return for sequestration.

It appears that no Missouri court has reversed a defendant's conviction because the trial court failed to read the recess instruction. In fact, the cases that have discussed this issue all involved the trial court's failure to read the long version of MAI-CR 3d 300.04 at the first recess. *State v. Feltrop*, 803 S.W.2d 1, 8 (Mo. banc 1991), *cert. denied*, 501 U.S. 1262 (1991) ;*Starke*, 811 S.W.2d at 801; *State v. White*, 880 S.W.2d 624, 625-26 (Mo. App. S.D. 1994); *Barajas*, 930 S.W.2d at 75; *State v. Dueker*, 990 S.W.2d 670, 682-83 (Mo. App. E.D. 1999); *Cable*, 4 S.W.3d at 572-75. Failure to read the long version of the instruction is presumptively more prejudicial than failing to read the short version at subsequent recesses after the jurors or veniremembers have already been cautioned. Yet the courts have refused to find any error, plain or otherwise, for failure to read the long version of the instruction. The failure to read either version of the instruction certainly does not rise to the level of manifest injustice. *See White*, 880 S.W.2d at 625 ("The matter complained of [failure to read MAI-CR 3d 300.04 at first recess] was relatively

insignificant and we do not see how it could create manifest injustice or miscarriage of justice.").

Appellant's counsel complained to the trial court that the failure to read the instruction was prejudicial because he had seen some newspaper boxes containing papers referring to the Amrine case. Beyond mere speculation that the sequestered jurors had seen these newspaper boxes, much less had actually read one of the papers, Appellant offered no evidence that any of the jurors had either discussed the case among themselves, had heard anything improper, or had even seen these newspaper boxes. Even in his brief before this Court, Appellant merely speculates about a potential for prejudice, not that any occurred. Whether the jurors may have seen newspaper boxes is an insufficient ground on which to find prejudice. In addition, sequestration of the jurors also militates against Appellant's claim of presumed prejudice.

Finally, relying on *Feltrop* and *Cable*, Appellant appears to argue that this Court must accept his claim of prejudice because he was not given the opportunity to question the jurors. But in those cases the courts simply noted–as an additional reason for rejecting the defendant's speculative claim of prejudice–that the defendant had failed to question the jurors during voir dire when the defendant had such an opportunity after the instruction was not given. These cases do not stand for the proposition that a defendant has the right to question the jurors to attempt to build a case for prejudice when the circumstances indicate that none exists.

V.

The trial court did not abuse its discretion in admitting into evidence a chart depicting the victims' family tree and in allowing the victims' oldest son to read a prepared statement, and it did not plainly err by allowing testimony that one of the victims' grandchildren was scared about coming to court, because admission of this victim-impact evidence was not prejudicial to the point of rendering Appellant's trial fundamentally unfair.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court overruled previous cases that had prohibited victim-impact evidence in capital cases. *Id.* at 829. Instead, the Court held that a "State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* at 827.

Consequently, "[v]ictim impact evidence is admissible under the United States and Missouri Constitutions." *Deck*, 994 S.W.2d at 538; *State v. Storey*, 40 S.W.3d 898, 909 (Mo. banc 2001), *cert. denied*, 534 U.S. 921 (2001). Punishment phase evidence, "may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others." Section 565.030.4, RSMo 2000. "The state is permitted to show the victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply 'faceless strangers.' *Deck*, 994 S.W.2d at 538; *Payne*, 501 U.S. at 825. "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific

harm caused by the crime in question." *Payne*, 501 U.S. at 825. "[V]ictim impact evidence violates the Constitution only if it is so 'unduly prejudicial that it renders the trial fundamentally unfair.'" *Deck*, 994 S.W.2d at 538-39, *quoting Payne*, 501 U.S. at 825; *see also Storey*, 40 S.W.3d at 909.

A. Standard of review.

"[T]he trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital case." *State v. Johns*, 34 S.W.3d 93, 112 (Mo. banc 2000), *cert. denied*, 532 1012 (2001). This discretion includes the ability to admit whatever evidence during the penalty phase that the trial court deems helpful to the jury in assessing punishment. *Id.*

B. Chart depicting the victims' family tree.

Appellant claims the trial court abused its discretion in admitting into evidence a chart depicting the victims' "family tree." At trial, Appellant's counsel argued that the chart didn't "show[ ] victim impact in any way" and that some of the children shown on the chart "weren't born [until] after the murders." (Tr. 373). Later Appellant's counsel complained that one person listed on the chart (their oldest son) predeceased the victims in 1977: "it's not like you can have impact in this world when someone's been dead for twenty years." (Tr. 384). Appellant's counsel essentially conceded that every living person depicted on the family tree could testify at trial, but argued that the chart depicting the family tree was inappropriate. (Tr. 384-85). The trial court, in overruling the objection, stated that "using

the chart" to identify the victims' family members was "much less prejudicial" to Appellant than calling each family member individually to testify at trial. (Tr. 385).

The family tree, as described by the victims' oldest surviving son, began with the murder victims and showed their children, grandchildren, great-grandchildren and spouses. (Tr. 410). The victims' son did state that some children listed on the chart had been born after the murders. (Tr. 410).

Appellant, relying solely on out-of-state cases, contends that a chart depicting the family tree was excessive because it contained the names of people not yet born when the murders occurred or names of spouses who were at the time of trial no longer part of the family. Although the crime's impact on grandchildren not yet born may not be as great as those already living, no one can seriously argue that the brutal murder of their grandparents had no effect on them whatsoever. What effect it did have on them was for the jury to assess. Also the victims' son informed the jury that some of the individuals listed were not yet born when the murder took place. Appellant could have also elicited testimony concerning which spouses were in the family at the time of the murders and which ones left at some later time.

In *Storey*, this Court held that the following was not excessive victim-impact evidence: (1) a photograph of the murder victim with her class of handicapped students; (2) a photograph of a memorial garden built in the victim's memory; (3) a photograph of the garden's memorial plaque; (4) a photograph of a "balloon release" ceremony at the school where the victim worked; (5) a sketch of the victim that hung in the school as a memorial;

and, (6) a special edition of the school newspaper commemorating the victim's death. *Storey*, 40 S.W.3d at 908-09. This Court even held that admission of a photograph showing the victim's tombstone, which was found to exceed "the scope of proper victim impact evidence," did not "so infect[ ] the sentencing proceeding as to render it fundamentally unfair." *Id.* at 909.

When viewed against this backdrop, the trial court here certainly did not abuse its discretion in admitting into evidence a chart depicting the victims' family tree.

C. Prepared statement read by victims' son.

Before the victims' son testified at trial, Appellant objected to a statement that the victims' son intended to read into evidence. (Tr. 386). Appellant complained that the statement, which he described as a "letter," was "long" and constituted "narrative" evidence. (Tr. 386). The prosecutor explained that the written statement was intended to emotionally assist the son in getting through his testimony:

> [The Prosecutor]: First of all, it wasn't a letter. It was his written statement that he used to assist in not breaking down during his testimony. The Judge heard it. It was not improper in any way. They [Appellant's attorneys] also have a motion in limine that says certain members of the family can't say certain things. We suggest that you write it down so you don't violate that motion in limine. That was our suggestion and he did that to make sure that he wouldn't because he wanted to follow the Court's order precisely.
>
> The Court: Is it his intention to read the same letter that he did at the first trial?

[The Prosecutor]: It is.

The Court: Or the same statement?

[The Prosecutor]: Statement, yes, sir.

The Court: I'll overrule that objection, at least in limine.

(Tr. 386). The victims' son later read the statement during his testimony without further objection. (Tr. 417-21).

This statement was the same one that the victims' son had read during Appellant's first trial. (1st Tr. 863-66). In the direct appeal from that trial, this Court rejected Appellant's claim that the trial court erred in not granting a mistrial because a few jurors and family members were seen crying after the son had testified. *Deck*, 994 S.W.2d at 538. In this appeal, however, Appellant does not contend that the statement created an "emotional outburst," but argues that the statement itself was excessive victim-impact evidence. The basis for Appellant's claim here is that the trial court allowed the son to read a narrative statement and that the statement contained the phrase: "How senseless this was to take the nucleus of our family away." (Tr. 421). Appellant's claim is without merit on both counts.

First, "no ironclad rule mandat[es] that testimony be taken in an interrogatory manner," and it is within the trial court's discretion to permit a witness to give a narrative response. *State v. Clark*, 693 S.W.2d 137, 142 (Mo. App. E.D. 1985); *see also State v. Sours*, 946 S.W.2d 747, 751 (Mo. App. S.D. 1997) ("The form of examination of a witness is a matter committed to the discretion of the court."). In *Storey*, this Court held that a

poem and eulogy that their authors read to the jury did not constitute excessive victim-impact evidence. *Storey*, 40 S.W.3d at 909. "The prosecutor's choice to use the recorded recollection simply does not result in unfair prejudice under these facts." *Id.*; *see also State v. Simmons*, 944 S.W.2d 165, 185-86 (1997), *cert. denied*, 522 U.S. 953 (1997) (holding that counsel was not ineffective during the penalty phase in failing to object when the murder victim's daughter's testified about dreams she had and the victim's sister read a prayer she wrote after the murder).

Second, to the extent that the son's comment asserted that the murders were senseless, it was entirely consistent with Appellant's counsel's statements and argument during trial: "What [Appellant] did was horrible." (Tr. 553); "[H]e made a lousy, lousy decision." (Tr. 557). Everyone involved in this case would agree, at a minimum, that what happened to the Longs was senseless. Appellant certainly hasn't shown that reading this statement rendered his trial fundamentally unfair.

D. Testimony concerning the victims' granddaughter.

Finally, Appellant contends that trial court plainly erred in permitting the victims' daughter to testify that her daughter (the victims' granddaughter) "was very anxious about [coming to court] and very worried and concerned, scared." (Tr. 399). The record shows that the granddaughter was either ten or eleven years old when this penalty phase was tried. (Tr. 397). Appellant contends that this testimony allowed the jurors to speculate that Appellant "was so dangerous that a little girl feared even seeing him in the courtroom." Appellant's Brief, p. 103.

But Appellant's argument overlooks the obvious: any child would likely be anxious, even scared, about coming to court regardless of the circumstances. Certainly the jurors all understood this. This testimony does not even directly suggest that the little girl was scared of Appellant. But even assuming one could infer that from this brief statement, no one, including the jurors, would expect anything different from a small child. Appellant has not demonstrated admission of this testimony was manifest injustice or a miscarriage of justice or that it rendered his trial fundamentally unfair.

VI.

The trial court did not err in overruling Appellant's objection to the prosecutor's argument asking the jurors to think about how long ten minutes is while they sit in the jury room during their deliberations, because this argument did not constitute improper personalization in that it did not suggest that Appellant posed a personal danger to the jurors or their families or asked the jurors to put themselves in the victims' shoes.

Appellant contends that the prosecutor's closing argument contained improper personalization. Appellant's claim is without merit because the prosecutor's asking the jurors to think about how long ten minutes–the time Appellant stood over the Longs before shooting them–actually is can be considered improper personalization.

A. The record involving Appellant's claim.

During his confession, Appellant stated that he stood at the foot of the Longs' bed for ten minutes and, as they begged for their lives, tried to decide what he should do before deciding to shoot them. (State's Ex. 69). In his closing argument, Appellant argued that during this ten-minute period he was scared and nervous and that the murders were an unplanned and hastily made decision:

> I want to talk a little bit also about the taped statement. [the Prosecutor] said listen to it and I'm saying listen to it. He [Appellant] does say, I'm sorry, I was scared and nervous. I walked around for ten minutes and didn't know what to do and I'm telling you, it's horrible and it's–and he made a lousy, lousy decision. He never should've

> shot. He never should be been [sic] in there in the first place. He never should've, but it's a split second and on the tape it says he went there to rob. This is not a planned out murder crime spree. It's still horrible and [the Prosecutor], I'm sure, is gonna argue he's just scared, he's nervous about getting caught, but you know in your reason and common sense that there's so much more involved in a person when they're sitting there with a life decision and that he was nervous and he was scared about what to do.

(Tr. 557). In response to this argument, the prosecutor urged the jury during its deliberations to think about how long ten minutes actually is:

> When you go back to the jury room, pick your foreperson, look at the instructions and you start talking about it. At some point would you stop and just sit there silently for ten minutes? Think about the evidence. Think about [Appellant] with the gun in his hand, James and Zelma Long lying on the bed. Ten minutes doesn't seem long. See how long that is just when you're sitting in the jury room. Think about them on their stomachs begging for their lives for ten minutes.

(Tr. 559). The trial court overruled Appellant's objection to this argument on the grounds of improper personalization. (Tr. 559).

B. Standard of review.

"Both parties have wide latitude in arguing during the penalty phase of a first degree murder case." *Storey*, 40 S.W.3d at 911; *see also State v. Ringo*, 30 S.W.3d 811, 821 (Mo. banc 2000), *cert. denied*, 532 U.S. 932 (2001). The trial court has broad discretion in controlling the scope of closing argument, and the court's rulings will be reversed only upon a showing of abuse of discretion. *Deck*, 994 S.W.2d at 543; *Black*, 50 S.W.3d at 790. Error during closing argument will cause a reversal only if there is "a reasonable probability that the verdict would have been different had the error not been committed." *Deck*, 994 S.W.2d at 543.; *State v. Williams*, 97 S.W.3d 462, 475 (Mo. banc 2003), *cert. denied*, 123 S. Ct. 2607 (2003).

C. The argument was not improper personalization.

Improper personalization occurs when the prosecutor's argument suggests that the defendant poses a personal danger to the jurors or their families. *State v. Basile*, 942 S.W.2d 342, 352 (Mo. banc 1997), *cert. denied*, 522 U.S. 866 (1997). "Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization." *Williams*, 97 S.W.3d at 474. The argument here neither implied any danger to the jurors, nor asked the jurors to place themselves in the victims' shoes. The prosecutor's argument was merely a response to Appellant's argument that his decision to shoot the Longs was made in a "split second."

In his first appeal, Appellant, relying on *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), raised a claim of improper personalization concerning a statement that was certainly much closer to the line than the statement made in this case:

> The prosecutor told the jury that while they were deliberating, they should "count out ten minutes and you think about how long that is *and then think about somebody pointing a gun at your head at the same time.*"

Deck, 994 S.W.2d at 544 (emphasis added). This Court found no plain error because the argument was "distinguishable" from the argument made in *Story*. In this retrial, the prosecutor never asked the jurors to imagine a gun pointed at their heads while they counted out ten minutes.

Appellant contends that this comment is no different than the one made in *Storey*, in which this Court held that the prosecutors' arguments were improper because they improperly "personalized" the crime to the jurors. But the prosecutor here was not personalizing the crime to the jurors, he was simply asking them to recognize just how long ten minutes is. Consequently, Appellant's reliance on *Storey* is misplaced.

Moreover, the argument made in *Storey* is not comparable in any sense to the statement the prosecutor made here. In *Storey*, a defendant convicted of capital murder alleged that his counsel was ineffective for not objecting to several improper arguments the prosecutor made during the penalty phase. *Storey*, 901 S.W.2d at 900. Among those arguments was the following:

> Think for just this moment. Try to put yourselves in Jill Frey's place. Can you imagine? And then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down your esophagus.

Id. at 901. This Court held that this argument was "grossly improper" because it had asked the jurors to "put themselves in Jill Frey's place, then graphically detail[ed] the crime as if the jurors were the victims." *Id.* As a result of counsel's failure to object to this and several other improper arguments, which "contained egregious errors, each compounding the other," the court found counsel ineffective and reversed the defendant's death sentence. *Id.* at 901-03.

The basis for the Court's decision in *Storey* rests on the ground that the jurors do not have to relive the crime as if they were the victims in deciding the defendant's guilt or innocence or in determining the appropriate punishment. Here, of course, the prosecutor did not ask the jurors to relive the crime as if they were the victims, but basically asked them to consider the credibility of Appellant's claim that his decision to shoot the Longs was made in a "split second."

Appellant also relies on *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999). But the argument in *Rhodes* consisted of the prosecutor physically demonstrating how the crime occurred while at the same time graphically describing its every detail:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are tied up. . . . And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you up. Your nose is broken. Every time you take a breath, your broken rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps your neck. . . . Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

Id. at 529. This Court assailed this type of argument, in which the crime is graphically detailed as if the jurors were the victims, as one that could only arouse fear in the jury. *Id.* Again, the argument at issue in this case in no way rises to the level of the argument condemned in *Rhodes*.

This is not a case where the jurors were asked to "relive the crime in graphic detail." *State v. Roberts*, 948 S.W.2d 577, 594 (Mo. banc 1997), *cert. denied*, 522 U.S. 1056 (1998). Nor is it a case where the prosecutor's argument contained numerous "egregious errors, each compounding the other" as was the case in *Storey*. *See State v. Kreutzer*, 928 S.W.2d 854, 873 (Mo. banc 1996), *cert. denied*, 519 U.S. 1083 (1997).

This Court has denied similar claims in other cases. In *State v. Smith*, 944 S.W.2d 901 (Mo. banc 1997), *cert. denied*, 522 U.S. 954 (1997), the defendant challenged an argument "which described the murders from the point of view of the victims." *Id.* at 918.

Noting that the argument had directly tracked the evidence at trial, the court held that no reversible error occurred. *Id.*

Likewise, in *State v. Roberts*, the defendant objected to the prosecutor's argument discussing the details of the murder, which he described as "a horrible, horrible death" and "the most God-awful crime," and urged the jurors to "[t]hink about what [the victim] went through." *State v. Roberts*, 948 S.W.2d at 594-95. In holding that these comments were not improper, the court observed that, viewed in context of the entire argument, the comments at issue did not "present a situation like that in *Storey* where the jurors were asked to place themselves in the position of the victim and relive the crime in graphic detail." *Id.* at 595.

Finally, in *Williams* the prosecutor asked the jurors "to imagine the fear [a prosecution witness] must have felt as [the defendant] choked her and told her not to tell anyone that he had confessed to the murder." *Williams*, 97 S.W.3d at 474. The defendant contended that the trial court plainly erred in allowing this argument because it constituted improper personalization. This Court disagreed because the prosecutor's argument "did not suggest personal danger to the jurors or use the kind of graphic detail that would prejudice the defendant." *Id.*

C. Appellant was not prejudiced.

The prosecutor's argument in this case did not constitute improper personalization. But even if one generously assumes that this argument was improper, Appellant has failed to carry his burden of showing that a reasonable probability exists that the verdict would

have been different if the statement had not been made. *See Deck*, 994 S.W.2d at 543; *Williams*, 97 S.W.3d at 475. The comment was "fair rebuttal" to Appellant's argument that his decision to murder the Longs was hastily made while he was in a nervous and agitated state. By asking the jury to count out ten minutes, the prosecutor was simply arguing that Appellant had ample time to cooly consider his decision to kill. In addition, this argument supported the State's claim that the murder involved "depravity of mind" (statutory aggravating circumstance No. 3) because Appellant rendered the victims helpless and then spent ten minutes listening to them beg for their lives before executing them.

VII.

The trial court did not abuse its discretion in striking veniremembers Richard Overmann and Michael Schaffer[20] for cause during death-qualification voir dire because the record shows that the trial court had sufficient grounds to believe that these veniremembers could not follow the law in that: (1) they both first indicated that they could never consider the death penalty; (2) at other times they were equivocal and vacillated in their responses on whether they could follow the law; and (3) neither one ever affirmatively responded that they could set aside their beliefs and follow the law.

Appellant contends that the trial court abused its discretion in striking two veniremembers for cause during death-qualification voir dire. The trial court properly exercised its discretion because the record shows it properly determined that these veniremembers would be unwilling or unable to follow the court's instructions and consider the full range of punishment.

A. The Constitutional standard for removal.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that a State cannot automatically exclude jurors from a death-penalty case simply because they had "conscientious scruples against capital punishment" or were opposed it. *Id.* at 512; *see also Wainwright v. Witt*, 469 U.S. 412, 418 (1985). The Court refined this doctrine in two

[20]Mr. Schaffer's name is misspelled as "Schaeffer" in Appellant's Brief.

cases following *Witherspoon*. *See Boulden v. Holman*, 394 U.S. 478, 483-84 (1969) (noting that a person who has a fixed opinion against or does not believe in capital punishment may nevertheless be able to follow the law and fairly consider imposition of the death penalty in a particular case); *Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978) (holding that prospective jurors were properly disqualified when they were unable to set aside their personal beliefs or convictions regarding capital punishment and take an oath to follow the law).[21]

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court, in considering the holdings of these previous cases, defined the standard for establishing whether a prospective juror in a capital case may be excused for cause:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

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[21]In *Lockett*, the excluded jurors were unable to respond affirmatively to the following question: "Do you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment." 438 U.S. at 595-96.

Id. at 45; *see also Wainwright*, 469 U.S. at 424. The *Adams* court also noted that a State "does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality." *Id.* at 46. The Court read *Witherspoon* as a limitation on the State's power to exclude prospective jurors on a basis any broader that their inability to follow the law or abide by their oaths. *Id.* at 48; *see also Lockhart v. McCree*, 476 U.S. 162 (1986) (holding that the Sixth Amendment's fair-cross-section requirement was not violated when prospective jurors were excluded for cause after stating that under no circumstances would they vote for death).

Consequently, no one can seriously argue that a prospective juror who can't or won't follow the law in a capital case may be excluded for cause. The easy cases are those in which prospective jurors unequivocally state that they will not under any circumstances follow the law and consider the death penalty. The more difficult cases are the ones in which jurors adopt no firm position or give no definitive answer about their ability to set aside their personal beliefs and follow the law.

In *Wainwright*, after reaffirming the *Adams* "standard" for juror exclusion, the Court held that a prospective juror's bias need not be proved with "unmistakable clarity" and that a trial judge may still lawfully exclude such jurors if the judge believes that the prospective juror would be unable to follow the law:

> [T]his standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be

> reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright, 469 U.S. at 424-26.

B. Standard of review.

In harmony with this line of reasoning, this Court has held that the qualifications of a prospective juror are not determined from a single response, but rather from the entire examination. *State v. Christeson*, 50 S.W.3d 251, 265 (Mo. banc 2001), *cert. denied*, 534 U.S. 978 (2001). The trial court is in the best position to evaluate the qualifications of a veniremember and has broad discretion in making that determination. *Id.*

C. The veniremembers responses during death-qualification voir dire.

During the prosecutor's death-qualification voir dire, both Mr. Schaffer and Mr. Overmann raised their hands when asked if there was "anyone here who for any reason could not or would not be able, no matter what the evidence is, no matter what they hear, no

matter what the instructions say, be able to vote for the death penalty." (Tr. 217; L.F. 196). The prosecutor then individually questioned both these veniremembers.

Mr. Schaffer

[The Prosecutor]: Mr. Schaffer, my question was basically anyone here who would not be able to vote for the death penalty no matter what the evidence was and I think you raised your hand?

Venireperson Schaffer: Right. I mentioned in chambers that I was very uneasy about this as far as–I would like to think I could do my job. I just don't, you know. I just don't know.

[The Prosecutor]: Well, I imagine everybody's uneasy about this.

Venireperson Schaffer: I understand.

[The Prosecutor]: What I need--

Venireperson Schaffer: The more I think about it the more I sat here this afternoon, I just couldn't.

[The Prosecutor]: You believe you'd have problems then following the Court's instructions and thereby not being able to consider both punishments, life without probation or parole or the death penalty?

Venireperson Schaffer: I would hate to try and swear an oath to it.

[Appellant's Counsel]: Excuse me. I didn't hear that last response. I'm sorry.

Venireperson Schaffer: I'm sorry. I said I'd hate to swear an oath to it.

[The Prosecutor]: Because you think that you might not be able to follow the Court's instructions?

Venireperson Schaffer: I might not be able to.

[The Prosecutor]: And actually vote for the death penalty if based upon the evidence–

Venireperson Schaffer: I just can't. Like I said, I'd try to do my job, but in the right conscience I just don't think I could.

(Tr. 218-19).

Although Appellant attempted rehabilitation, Mr. Schaffer equivocated and ultimately concluded that he did not know whether he could follow the court's instructions:

[Appellant's Counsel]: Okay. Mr. Schaffer, same to you. If you ended up–You indicated that you were uncomfortable in regards to the fact that this is a death penalty case, is that accurate.

Venireperson Schaffer: That's true.

[Appellant's Counsel]: Just knowing that the State is seeking the [sic] death makes you uncomfortable?

Venireperson Schaffer: Yes. Like I stated earlier, it's the first time, you know, just walking into today not knowing what the case was gonna be like. It's kind of a shock to find out that we're gonna be possibly sentencing him to the death penalty and it does make me uncomfortable. I've never faced it before. I don't know if I could do it.

. . . .

[Appellant's Counsel]: Knowing that the Court will give–If you get picked to be on this jury the Court will give you instructions of what the law is and again, we've talked about that. . . .

My question is, would you be able to sit and listen to the evidence and follow the instructions and consider all the evidence and consider both punishments?

Venireperson Schaffer: I would certainly–If I were to sit on the jury I would vote–well that's my problem. I don't know.

[Appellant's Counsel]: You don't know.

Venireperson Schaffer: No.

[Appellant's Counsel]: Your answer would still be that you've never thought about it enough and you haven't had enough time.

Venireperson Schaffer: Well, I thought about it this afternoon, you know, and earlier this morning when I talked to you in chambers. In fact, the more I hear and think about it, it's gonna be hard for me if I would actually sit on this jury and base that decision. If I ever do this again I honestly wouldn't want to.

[Appellant's Counsel]: Certainly we're not asking you to say what you would do in this case because you haven't heard all the evidence. All we're asking is to follow the law and consider everything presented to you to make–

Venireperson Schaffer: I certainly would like to believe I could do my job, but until, you know, I actually have to face that part, whether I could, you know, I don't know.

(Tr. 234-37).

Mr. Overmann

Mr. Overmann also expressed grave reservations about his ability to follow the court's instructions and consider imposing the death penalty.

[The Prosecutor]: Mr. Overmann, you also have problems with being able to follow the Court's instructions and consider the death penalty in this case?

Venireperson Overmann: Yeah, I would have a problem with the death penalty.

. . . .

[The Prosecutor]: You think you would have problems following the Court's instructions in considering voting for the death penalty in a case like this?

Venireperson Overmann: I would have trouble with it.

[The Prosecutor]: And therefore you would have a problem in taking an oath as a juror to follow the instructions because one of the possible punishments is the death penalty, it that a fair statement?

Venireperson Overmann: Yes.

[The Prosecutor]: Because you wouldn't want to violate your oath?

Venireperson Overmann: If the State says there's no possibility for parole, I mean that would be the way. In my opinion that'd be the way I'd handle it, not the death.

[The Prosecutor]: So basically you've got a preconceived notion as the way to handle it and that's life without probation or parole and not the death penalty?

Venireperson Overmann: Right.

(Tr. 219-21).

Although Appellant attempted rehabilitation, Mr. Overmann never definitively stated that he could follow the court's instructions and consider both punishments:

[Appellant's Counsel]: Mr. Overmann, you knew I'd get to you. In regards to the death penalty, in your conversation with [the Prosecutor] earlier you indicated that you had a problem with the death penalty and you thought life without probation or parole would be the way to handle it. When you said that, are you talking about the way to handle this case in particular or any case that involves premeditated, first degree murder?

Venireperson Overmann: I'd probably have a problem. I have a basic belief, you know, that taking–if they're removed from society, that they're no threat to nobody any more, so why take their life. So that's why I would have a problem with it. I could go through the instructions and the evidence. I would have a problem going that far. I don't think I can go any further than

just–I cannot go for the death penalty, that it would have to be life without parole.

[Appellant's Counsel]: You could not consider the death penalty as a possibility knowing that you haven't heard all the evidence in this case? You're saying any case?

Venireperson Overmann: It'd be hard for me. I would have to listen to it. I can stay open-minded, but I definitely–it would be hard for me to–

[Appellant's Counsel]: So you'd be able to sit on the jury and stay open-minded and listen to all the evidence and then at the time where you have to make your decision you'd be able to follow the instructions, knowing that the instrucitons would never require you to say, give the person the death penalty?

Venireperson Overmann: Yeah, I guess.

(Tr. 237-38).

D. The trial court properly excluded these veniremembers.

The record shows that the trial court did not abuse its discretion in excluding veniremembers Shaffer and Overmann for cause. The fact that both these veniremembers initially raised their hands when asked if anyone would be unable to consider the death penalty regardless of the evidence, then reinforced that belief during much of voir dire, and finally equivocated and vacillated on whether they could follow the court's instructions was itself sufficient to uphold the trial court's exercise of its discretion to strike them. Neither

veniremember ever once affirmatively stated that he could follow the court's instructions and consider both punishments.

"A juror's equivocation about his ability to follow the law in a capital case together with an unequivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury" (citation omitted). *State v. Rousan*, 961 S.W.2d 831, 840 (Mo. banc 1998), *cert. denied*, 524 U.S. 961 (1998); *see also Christeson*, 50 S.W.3d at 265. The trial judge's exercise of discretion in excusing a prospective juror has been upheld in cases similar to this one. *See, e.g., State v. Storey*, 40 S.W.3d at 905 (veniremember initially said he could never return a death sentence, then said he could in a "very severe case"); *State v. Winfield*, 5 S.W.3d 505, 510-511 (Mo. banc 1999), *cert. denied*, 528 U.S. 1130 (2000) (veniremember initially said she "[didn't] think she could" assess death, then said that she could follow the law); *State v. Clayton*, 995 S.W.2d 468, 475-76 (Mo. banc 1999), *cert. denied*, 528 U.S. 1027 (1999) (veniremember stated that he could only vote for death in "extreme cases").

Neither of these veniremembers were unable to state that they could set aside their personal convictions against the death penalty and follow the law in this case. They initially indicated that they would automatically vote against the death penalty, and their responses during voir dire obviously left the trial court with the definite impression that they could not follow the law and fairly consider the death penalty. A generous reading of the record suggests that they did not know whether they could do so. The trial court was not required to allow these veniremembers to sit on the jury based only on the hope that they would

ultimately follow the law, especially when they both initially and unequivocally indicated that they would never consider the death penalty no matter what the evidence showed.

Finally, the trial court treated motions to strike for cause in an even-handed manner. The court also excluded those veniremembers who either unequivocally stated that they would automatically vote for death or who were equivocal about their ability to fairly consider both punishments after initially expressing favor for the death penalty. (Tr. 207, 216, 223-25, 230-31, 239-41, 243-44, 252, 254-55, 256).

On the record in this case, the trial court did not abuse its discretion in excluding veniremembers Shaffer and Overmann for cause.

VIII.

This Court should, in the exercise of its independent statutory review, affirm Appellant's death sentence because: (1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's findings of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant.

Under the mandatory independent review procedure contained in § 565.035.3, RSMo 2000, this Court must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the strength of the evidence and the defendant.

Deck, 994 S.W.2d at 544. This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1994).

In Appellant's previous appeal, this Court found that Appellant's death sentences were not excessive or disproportionate. *Deck*, 994 S.W.2d at 545. The jury in his previous case found the same six statutory aggravating circumstances that the jury in this case found:

> 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11).

Deck, 994 S.W.2d at 545. (L.F. 216, 222, 231). This Court held that from its review of the record, "the evidence amply supports the statutory aggravators found by the jury." *Id.* Since the retrial of the penalty phase in this case involves virtually the same evidence concerning the statutory aggravating circumstances as the first case, this Court's previous holding should remain the same.

Moreover, in Appellant's previous appeal this Court held that the previous death sentences were not excessive or disproportionate:

> Finally, the imposition of the death penalty in this case is clearly not excessive or disproportionate. The strength of the evidence and the circumstances of the crime far outweigh any mitigating factors in Deck's favor.

Id. This Court then cited numerous Missouri cases similar to Appellant's in which the death penalty was imposed: (1) "on defendants who murdered more than one person"; (2) "when the murder involved acts of brutality and abuse that showed depravity of mind"; and (3) "where the murder was committed in hopes of avoiding arrest or detection." *Id.* On the strength of these cases, this Court then concluded that the "death penalty imposed in [Appellant's] case is proportionate to the sentence imposed in similar cases. *Id.*

Nothing in the record of this penalty-phase retrial suggests that Appellant's sentence was imposed under the influence of prejudice, passion, or any other improper factor. This Court reached the same conclusion in Appellant's previous appeal. *Id.* Appellant contends that such circumstances exist, but then supports his claim by simply repeating his allegations of trial court error argued elsewhere in his brief.

The mitigating evidence Appellant offered during the penalty phase retrial was nearly identical to that offered in his previous case. The same witnesses who testified during the first penalty phase (Rita Deck, Bev Dulinski, Major Puckett, and Michael Deck) testified during this retrial. (Tr. 454-532; 1st Tr. 878-922). Their testimony, again similar to that presented at the first trial, was that Appellant had a difficult childhood. In addition, during this retrial Appellant called one additional family member (Elvena Deck), who also testified about Appellant's childhood, and a child psychiatrist. (Tr. 466-525).

The child psychiatrist, who mainly offered hearsay testimony concerning events in Appellant's childhood, simply testified that in her opinion Appellant's childhood experiences had an adverse affect on his development exhibited by his difficulty in his maintaining relationships, his failure to succeed in life, his low self-esteem, and refusal to seek treatment (Tr. 504). But the psychiatrist conceded that similar experiences were shared by Appellant's siblings, including his brother, Michael Deck, who joined the military and later became a police officer for St. Louis City. (Tr. 505, 514; Deck depo. p. 5). The psychiatrist offered no opinion that Appellant committed the murders because of these childhood experiences, and she conceded that Appellant knew the difference between right and wrong. (Tr. 506, 525-26).

A bad or difficult childhood is not sufficient grounds on which to set aside a death penalty, especially in a case as heinous as this one. *See State v. Brooks*, 960 S.W.2d at 503 (refusing to find death sentence disproportionate on the ground that the defendant had an "extremely difficult childhood").

Appellant, relying on *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982), claims that his sentence is disproportionate because he confessed to the crimes. In *McIlvoy*, this Court set aside a death sentence in which the defendant was merely a "follower" in a murder scheme in which the primary perpetrator received only a life sentence. *Id.* at 341-42. Other factors contributing to this Court's decision were that the defendant had a minimal juvenile record, limited education and intelligence, and an alcohol problem. *Id.* This Court also noted that the defendant initiated a telephone call to St. Louis police from Dallas,

where he had fled, to voluntarily turn himself in and then "patiently waited" in Dallas for the St. Louis police to pick him up. *Id.* But this alone was not a factor in setting aside the death sentence, instead it was more proof that the defendant was a "weakling and follower" in executing the murder scheme. *Id.*

McIlvoy does not remotely apply to Appellant's case. Here, Appellant was the obvious ringleader and the one who pulled the trigger. Moreover, Appellant did not turn himself in and confess his crimes. He was arrested driving with his lights off near his sister's apartment. (Tr. 290, 303). Back at the police station, Appellant at first said he had been in Jefferson County with his sister looking for cars to buy. (Tr. 431). Four hours later, Appellant changed his story and said that he had followed his mother's boyfriend, Jim Boliek, to Jefferson County and that Boliek had left him for fifteen minutes and when Boliek returned he handed Appellant the decorative tin and the pistol police found in Appellant's car. (Tr. 432-33). After being informed that Boliek had an alibi, Appellant finally confessed to shooting the Longs. (Tr. 435-43). This behavior can hardly be described as mitigating, and it certainly forms no basis for finding Appellant's sentences disproportionate.

Appellant also claims that this Court's proportionality review violates due process and is fatally flawed because it does not provide timely notice or a meaningful opportunity to be heard, and it considers only cases in which death was imposed and not all factually similar cases. These claims have been repeatedly rejected. *See State v. Smith*, 32 S.W.3d

at 558; *Rousan*, 961 S.W.2d at 854-55; *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998), *cert. denied*, 525 U.S. 1085 (1999).

Finally, Appellant suggests that the Eighth Amendment requires this Court to conduct a de novo review of the punishment imposed in this case. But the Eighth Amendment is irrelevant to this issue, because "proportionality review is not constitutionally mandated. *Morrow v. State*, 21 S.W.3d 819, 829 (Mo. banc 2000), *cert. denied*, 531 U.S. 1171 (2001); *Murray v. Delo*, 34 F.3d 1367, 1377 (CA8 1994), *cert. denied*, 515 U.S. 1171 (1995); *Pulley v. Harris*, 465 U.S. 37 (1984).

This Court conducts proportionality review that utilizes de novo analysis when appropriate while at the same time giving proper deference to the facts supporting the conclusions made by juries and trial courts. In passing § 565.035, the legislature did not intend for this Court to ignore the findings made the jury and its recommendation as to punishment and instead allow this Court to impose sentence as if it had been the trier of fact. This Court's proportionality review was "designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences." *Ramsey*, 864 S.W.2d at 328. Under this scheme, the trial court is the final sentencer. *Feltrop*, 803 S.W.2d at 1. This Court simply reviews the sentence and, while giving due deference to the conclusions reached below, determines whether the sentence is disproportionate as a matter of law.

Even if the Eighth Amendment proportionality cases did apply, it would not assist Appellant because those cases do not authorize an appellate court to discard a sentence that it would not impose if it were the sentencer:

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Solem v. Helm, 463 U.S. 277 (1983).

In conducting such a review, the factual findings made by trial courts are accepted unless they are clearly erroneous, and the question of whether the sentence violates the Constitution is one of law, which is reviewed de novo. *Cooper Indus., Inc. v. Leatherman Toolgroup, Inc.*, 532 U.S. 424, 435 (2001); *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998). This same rule is consistently applied by appellate courts in other contexts. Facts are found by the lower court, while the appellate court determines the legal issues as a matter of law. *See State v. Goff*, No. SC85564 (Mo. banc Mar. 9, 2004) (under Fourth Amendment analysis this Court conducts de novo review on legal issues but defers to trial court's factual findings).

The death sentences given Appellant in this case were neither excessive or disproportionate to other similar cases.

IX.

The trial court did not commit error, plain or otherwise, in overruling Appellant's Motion to Quash the Information and the court did not exceed its jurisdiction in sentencing Appellant to death because the State is not required to plead the statutory aggravating circumstances or any other facts on which it intends to rely under § 565.030.4(1), (2), or (3), RSMo 2000, in the Information in that: (1) this claim has been repeatedly rejected by this Court; (2) neither *Apprendi v. New Jersey, Ring v. Arizona,* nor *State v. Whitfield* contain such a requirement; and (3) Appellant received pretrial notice of these circumstances according to § 565.005, RSMo 2000, which satisfied Appellant's rights under the Sixth and Fourteenth Amendments to be informed of the nature and cause of the accusation against him.

Appellant attacks the information on the ground that the statutory aggravating circumstances or other determinations required to be made under § 565.030.4 were not pleaded in the information filed against Appellant. Appellant did not raise this claim before the trial court until the State had nearly completed presenting its case. Consequently this claim is not preserved for appellate review. (Tr. 426). In any event, this precise claim was recently rejected by this Court in *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002), *cert. denied*, 123 S.Ct. 2287 (2003):

> The Appellant's contention of a violation of *Apprendi* is without merit: pursuant to section 565.005.1, the State gave Appellant notice that it would seek the death

> penalty, and the aggravating circumstances were proved to a jury beyond a reasonable doubt. "The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty."

Id. at 766-67, *quoting State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002), *cert. denied*, 537 U.S. 865 (2002); *see also State v. Edwards*, 116 S.W.3d 511, 543-44 (Mo. banc 2003), 124 S. Ct. 1417 (2004) ("Where . . . the state gave the defendant pretrial notice, pursuant to section 565.005, of the aggravating circumstances it intended to prove at the penalty phase of trial, it was not required to list them in the indictment."); *State v. Gilbert*, 103 S.W.3d 743, 747 (Mo. banc 2003). This Court's decision in *Whitfield* offers Appellant no assistance on his claim that the information or indictment must allege these facts. Nothing in *Whitfield* suggests that the notice provided under § 565.005 is constitutionally inadequate.

Under § 565.005.1, RSMo 2000, the state is required to give the defendant notice "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The State did so in this case (L.F 57-60, 119-20, 134-35). Although phrased as a challenge to the charging document in this case, Appellant's real contention is that § 565.005.1 is unconstitutional under *Apprendi*.

Appellant's construction of *Apprendi* as creating a requirement that statutory aggravating circumstances be pleaded in the indictment or information is refuted by the

language of that decision. The issue presented to the Court in that case was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 469. Relying upon the guarantee under the Sixth and Fourteenth Amendments of a trial by jury, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 476, 490. Thus, the holding of *Apprendi* concerned what matters must be submitted to and found by a jury, not what must be contained in an indictment or information.

If the plain language of the *Apprendi* Court's holding is insufficient to dispose of Appellant's reliance on that case, then the Court's express statement that it was not addressing what must be alleged in the charging document should be:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . [The Fourteenth] Amendment has not . . . been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in *Almendarez-Torres v. United States*. We thus do not address the indictment question separately today.

Id. at 476 n.3 (citation omitted).

Appellant ignores the stated holding of *Apprendi* and the footnote quoted above, but his argument is still without merit to the extent he relies on language from *Jones v. United States*, 526 U.S. 227 (1999), which was identified in *Apprendi* as "foreshadowing" the *Apprendi* decision. *Apprendi*, 530 U.S. at 476.

The issue in *Jones* concerned the construction of the federal carjacking statute. In particular, the issue focused on whether particular statutory language was an "element" of the crime, in which case it was required to be alleged in the indictment and found by the jury; or whether it was a "sentencing factor" that need not be charged and could be found by the court. *Jones*, 526 U.S. at 230-232.[22] The majority found that the statutory language constituted an element of the crime, but noted in extended *dicta* its view that sentence enhancements might also violate due process if not charged and found by the trial jury. *Id.* at 240-50.[23] The majority's view was that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*. at 246 n.6.

This *dicta* from *Jones* certainly "foreshadowed" the holding in *Apprendi* that any fact that increased the range of punishment must be found by a jury. That the *Jones* dicta

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[22]This distinction between "elements" and "sentencing factors" was later abolished in *Apprendi*. 530 U.S. at 478-90.

[23]That this was *dicta* was confirmed in *Apprendi*. 530 U.S. at 472-73.

concerning what must be pleaded in an indictment was not a holding in *Apprendi* is established by: (1) the statement in *Apprendi* that it was not addressing what must be pled in the indictment; (2) the fact that the quotation from *Jones* cites the Fifth Amendment to the United States Constitution which, in the context of indictments, applies to the federal government (as in *Jones*) but not to the states (as in *Apprendi*); and (3) the rejection of this construction of *Apprendi* by other jurisdictions.[24] Any claim that *Apprendi* supports Appellant's argument is without merit.

The United States Supreme Court's decision in *Ring*, which for the first time held that the Sixth and Fourteenth Amendments do not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," does not alter this analysis. *Ring*, 536 U.S. at 609. An examination of that decision confirms that it does not, any more than *Apprendi*, hold that statutory aggravating circumstances must be pleaded in the indictment or information. The Supreme Court noted that the issue before it was limited:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . .

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[24]*See e.g.*, *Poole v. State*, 846 So.2d 370, 385-87 (Ala. Crim. App. 2001); *State v. Nichols*, 33 P.3d 1172, 1174-76 (Ariz. App. 2001); *State v. Mitchell*, 543 S.E.2d 830, 842 (N.C. 2001), *cert. denied*,122 S.Ct. 475 (2001); *United States v. Sanchez*, 269 F.3d 1250, 1257-62 (CA11 2001), *cert. denied*, 535 U.S. 942 (2002).

> Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n.3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Id. at 597 n.4.

The Indictment Clause of the Fifth Amendment does not apply to the states. *Apprendi*, 530 U.S. at 477 n.3. The only constitutional provision relevant to state charging documents is the Sixth Amendment requirement that an accused "be informed of the nature and cause of the accusation," which has been applied to the states through the Fourteenth Amendment. *Blair v. Armontrout*, 916 F.2d 1310, 1329 (CA8 1990), *cert. denied*, 502 U.S. 825 (1991). The difference between the rights guaranteed by the Fifth Amendment and those guaranteed by the Sixth and Fourteenth Amendments is instructive. The Fifth Amendment's Indictment Clause specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the "nature and cause of the accusation" and do not specify the form that this notice must take.[25] Even legally insufficient charging documents have been

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[25]"[T]he states are not bound by the technical rules governing federal criminal prosecutions" under the Fifth Amendment. *Blair*, 916 F.2d at 1329. Fifth Amendment

held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. *Hartman*, 283 F.3d at 194-96; [25]*Blair*, 916 F.2d at 1329. Under Missouri law, Appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in *Apprendi*, *Ring*, or any other case supports Appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Appellant's reliance on *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), is also misplaced. In *Nolan*, the defendant was convicted and sentenced of the crime of first-degree robbery by means of a dangerous and deadly weapon, which carried a greater penalty than the crime of first-degree robbery. *Id.* at 52. The court held that the information was insufficient by charging the defendant with first-degree robbery "with force and arms" because this language was not the same as charging that the defendant used a dangerous and deadly weapon. *Id.* at 54. Here, by contrast, Appellant was given notice of the statutory aggravating circumstances upon which the State intended to rely. Also, this Court's later decisions in *Cole*, *Tisius*, *Edwards*, and *Gilbert* control over the holding in *Nolan*, which is distinguishable on its facts.

Appellant bases his claim on his contention that Missouri law recognizes two distinct offenses, "aggravated" and "unaggravated" first-degree murder. Because the State

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decisions are therefore of "little value" in evaluating state indictments or informations. *Hartman v. Lee*, 283 F.3d 190, 195 n.4 (CA4 2002), *cert. denied*, 537 U.S. 1114 (2003).

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failed to include that statutory aggravating circumstances in the information, Appellant claims that he was charged with only the "unaggravated" offense and was thus ineligible to receive the death penalty. But this Court squarely rejected this argument in *Tisius*. *Tisius*, 92 S.W.3d at 766-67.

Appellant's reliance on *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003), to support his position is also misplaced since that case involves the application of the Double Jeopardy Clause to capital-sentencing proceedings, not what must be pleaded in an indictment or information. Appellant contends that the Court held that the underlying offense of murder is a lesser-included offense of murder plus one or more statutory aggravating circumstances. But the Court made no such holding. In context, the opinion simply states that for purposes of the Sixth Amendment's jury trial guarantee, the offense of capital murder requires the finding of an additional element–a statutory aggravating circumstance–not present in a non-capital murder case:

> That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances."

Id. at 739. Moreover, this statement was included in Part III of the opinion, which was joined by only three Justices.

In short, Appellant's claim that the Constitution requires that the indictment or information was plead the statutory aggravating circumstances is without merit.

CONCLUSION

The trial court did not commit reversible error in this case, and Appellant's death sentences were not imposed contrary to Missouri law. Appellant's sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 25,802 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on April 5, 2004, to:

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